Sister M. Dennis Lynch

"U.S. by Bus"

Probation and Parole Training Series:

ADULT PROBATION ENFORCEMENT GUIDE

Ontario
Ministry of Correctional Services

Human Resources Management
Staff Training and Development

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ACKNOWLEDGEMENTS

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INTRODUCTION

In order that probation enforcement practices remain up-to-date and responsive to changes in the law, the Staff Training and Development Branch is offering a fourth revised edition of the guide. As with the original guide, which was printed in September 1979, the content of the guide remains very much a combination of theory and "how to" methods. We continue to recognize that practices vary from area to area, and as a result, the reader will still find the unavoidable suggestions referring him or her to the area manager for a clarification of local procedures. This guide outlines procedures for enforcement in the adult system.

The reader will find that there are a number of revisions. The material has been up-dated and the sections on revocation and special topics have been expanded. The revised guide focuses on summaries of the more recent appeal cases, pertinent to the Probation Officers work.

Despite the changes, the intent is still to provide a basic overview of the wilful failure process, so that new officers may more easily understand and become comfortable with the enforcement aspect of their job. None of the ideas and suggestions contained in this "new, improved" enforcement edition over-rule basic common sense and workable local practice.

John de Dominico
Director,
Staff Training and Development

October, 1985

SECTION I

TRIAL PROCEDURE

(A) TRIAL PROCEDURE - SUMMARY OFFENCES

1. Purpose of Trial
2. Summary vs. Indictable Offences
3. Laying a Charge
4. Bail
5. Court Appearances
6. The Trial Itself
7. Plea Bargaining

(B) TRIAL SEQUENCE - FLOW CHART

(A) TRIAL PROCEDURE - SUMMARY OFFENCES

1. Purpose

The purpose of a trial is to determine whether the crown attorney can prove, according to laid-down standards and rules, that an accused person has committed the offence with which he is charged. If a finding of guilt is made, then the court must arrive at the appropriate sanction.

2. Summary vs. Indictable Offences

Within the Canadian judicial system, there are two types of offences: summary and indictable. The main distinction between the two types is procedural, and depending upon whether an offence is summary or indictable, procedures relating to arrest, trial, and appeal may vary. All summary offences are dealt with according to trial procedures laid down in Part XXIV of the Criminal Code, and are heard exclusively at the level of the provincial court. All offences under provincial statute (e.g. minor consume, petty trespass) are summary conviction offences, and as such are processed within the provincial court system under the Provincial Offences Act, S.O. 1979. Indictable offences, however, fall into a number of categories, and these categories determine which court has jurisdiction to try the offence. The categories are as follows:

CATEGORY		TRIED BY
i) Offences under s.427 (e.g. 1st and 2nd degree murder)	→	SUPREME COURT
ii) Indictable offences under s. 483 (e.g., False Pretences)	→	PROVINCIAL COURT (Absolute jurisdiction of magistrate. Part XVI of the Code.
iii) Offences which fall outside both s. 427 and 483. (e.g. Theft over $1,000)	→	ACCUSED HAS OPTION: A. Provincial Court (by magistrate Part XVI - trial) B. By judge without a jury in the District Court (Part XVI trial), or C. By judge and jury (Trial will be either in General Sessions of the Peace, or in Supreme Court depending on where the prosecution brings the indictment. In either event it is a Part XVII trial.)

It should be noted that there is an increasing category of offences which are stated to be either indictable or summary at the option of the Crown. (e.g. Theft under $1,000, Drive While Impaired).

In addition to the procedural distinction between summary and indictable offences, we find that summary offences under the Criminal Code tend to be less serious, and involve a maximum penalty of $2,000, 6 months in jail, or both. Indictable offences, however, tend to be of a more serious nature, and the maximum penalties are consequently greater.

3. Laying a Charge

The method by which a charge is introduced into the court system is through the swearing of an "information" against the person alleged to have committed the offence in question. The information is essentially a sworn statement which attests that the informant (the person laying the charge) has reasonable grounds to believe that an offence has been committed. Anyone can swear an information, but to do so, he or she must first convince a justice of the peace (before whom all informations must be sworn) that the charge is legitimate and necessary.[1] In areas where a Court Liaison Officer is the informant, the Probation and Parole Officer initiating the charge becomes the complainant. A summons is usually issued to the police who attempt to serve it on the accused. Basically the summons is a notice which advises an individual that he is being charged with a particular offence and that he must appear in court on a certain date. If the allegation of the informant or the evidence of any witness or witnesses discloses reasonable and probable grounds to believe that it is necessary in the public interest to issue an arrest warrant, then the justice of the peace has the authority to do so. Warrants are also issued in instances where the accused has evaded the service of a summons, or if his whereabouts are unknown.

For further information on the various legal documents, refer to Section VI.

4. Bail

Once a person has been arrested on a warrant he can be released by the police on a promise to appear in court on a specified date if the warrant is endorsed by a Justice of the Peace, or he can be held in custody for a show cause hearing (also known as a "bail hearing"). Since the adoption of the Bail Reform Act, in 1972, the police are authorized to release individuals on a promise to appear for a large variety of offences; including all summary conviction offences, and offences described under section 483 of the Code[2]. In addition to these offences, the "officer in charge" of a police station can release on a promise to appear or recognizance those persons who have been charged with any offence which does not carry a penalty of more than 5 years.

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1 A J.P. must accept the complaint, but he does not have to proceed any further with the charge.

2 Some examples of offences under section 483 include False Pretences and Possession of Stolen Property.

Except in cases such as murder, all show cause hearings take place at the level of the Provincial court where a justice of the peace or judge has the option of releasing an accused person prior to trial, or to hold him in custody. In most cases, the Crown must "show cause" why the accused should be held in custody. In order to detain a person in custody (detention order), the onus is on the Crown to show that there are reasonable grounds to assume that:

i) the accused will not show up for his trial, or

ii) that there is a likelihood he will commit a further offence, or interfere with the administration of justice (e.g. by threatening a witness).

In a number of instances, (for example where a person-at-large on one indictable offence is arrested on a new indictable offence) the onus shifts to the accused to show cause why he should not be detained in custody. In cases where the accused is not detained, he must be released on an undertaking to appear unless a more onerous form of release is shown to be necessary by the Crown. In ascending order of severity, these forms of release are as follows:[1]

i) Release on an undertaking without any conditions (other than undertaking to appear in court.)

ii) Release on an undertaking with conditions (e.g. report to police, abstain from alcohol, etc.)

iii) Release on a recognizance with or without sureties (e.g. an acknowledgement that a specific sum of money will be owed by the accused to the Crown in the event of a non-appearance). A surety is a person who "guarantees" the appearance of the accused by acknowledging that he will owe money to the Crown should the accused not appear for court.

iv) Release on a recognizance, with or without sureties and conditions, but, in addition requiring deposit of a sum of money or security.

If an accused released on a recognizance with sureties and/or deposit fails to appear for court, he or his surety could forfeit the amount of money put up or signed for to guarantee his appearance. In addition, no matter what the form of release, failure to appear for court will result in a bench warrant being issued for arrest of the accused, and he will be charged with the separate criminal offence of "Failing to Appear" (Code, s.133).

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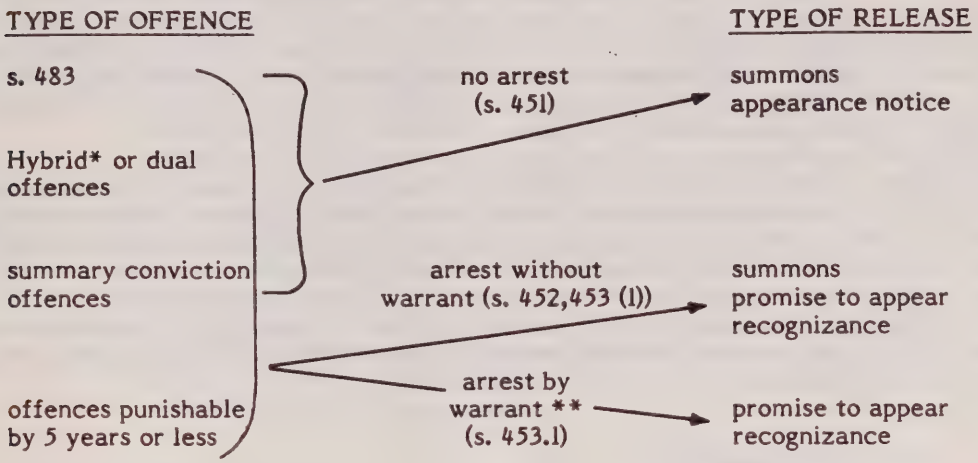
1 Extracted from Grant, A: "An Introduction to Canadian Criminal Procedure (1976)".

PRE-TRIAL RELEASE - A SUMMARY

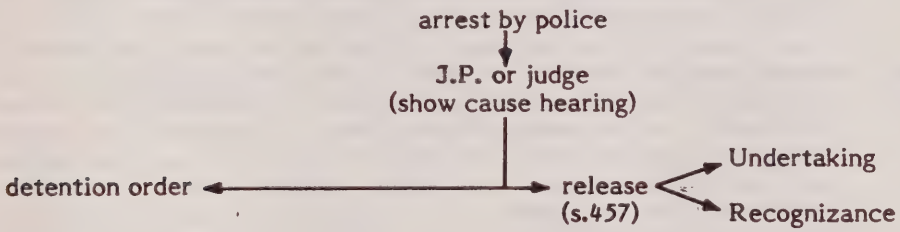
RELEASE BY POLICE

The police can release individuals for a wide variety of offences. A number of forms of release are available, depending upon whether an arrest is made or not, where an arrest is made, and whether it was made with or without a warrant. A simplified summary of release mechanism can be depicted as follows:



JUDICIAL RELEASE

Any person arrested, with or without a warrant, and who has not been released by the police, must be brought to a justice of the peace or judge within 24 hours, or as soon as possible thereafter. The justice shall release the accused, unless the court is convinced that further detention is necessary.



* offences which can be tried either summarily or on indictment, at the option of the Crown.

** where warrant is endorsed for release by J.P.

For a complete review of bail law, refer to the Code, Section 451-459.

5. Court Appearances

At any early stage, although not necessarily the very first court appearance, the charge will be read to the accused (arraignment) and he will have any trial options put to him which apply in his case (see previous section on summary vs. indictable offences). If he elects trial by magistrate (provincial court judge) or he is charged with an offence where he has no option but to be so tried (e.g. s. 483 and summary conviction offences) then he will be asked to plead guilty or not guilty.

The Criminal Code allows the court to adjourn the matter to a later date, to permit the defence and Crown to prepare their cases and secure their witnesses. The court can agree to as many adjournments as it sees fit, but because of the resultant delays in bringing a case to trial, the courts are beginning to place stricter controls on the number of adjournments.

For summary conviction proceedings, the court may direct an accused to attend a place for medical observation in order to assess whether he is fit to stand trial, or remand him in custody for a period not exceeding 30 days for this purpose. Although s. 738 requires that there be medical evidence to support such action, s. 738 (6) permits the court to act without such medical evidence "where compelling circumstances exist and where a medical practitioner is not readily available to examine the accused".[1]

6. The Trial Itself

The Canadian trial system is an "adversarial" one wherein the Crown prosecutor, on behalf of the state, and the defence counsel, on behalf of the accused, square off in a contest to determine guilt or innocence. The Crown's task is to show the court that the accused is guilty beyond a reasonable doubt, and the task of the defence counsel, as champion of the accused, is to discredit the Crown's case in an attempt to secure a dismissal of the charge or charges against his client. The judge's role is one of a neutral arbiter, who, once the respective presentations have been made, gives a judgement in the matter, and in the event of a finding of guilt (verdict of guilty) must then pass sentence upon the accused. At the trial's outset, the Crown calls his witnesses individually to the stand. In the case of a wilful non-compliance charge, this will be the probation officer, as well as other witnesses who will give testimony concerning alleged breach in response to questions from the Crown. This aspect of the trial is known as the examination-in-chief. After each witness has presented his evidence, the defence counsel then has the opportunity to cross-examine these witnesses, in order to discredit the evidence, or to solicit additional facts which may be favorable to the accused. Following cross-examination, the Crown has the right to re-examine each witness in order to clarify certain issues arising out of the cross-examination. After the prosecution's evidence has been presented, the defence counsel may wish to submit to the judge that there is "no case to

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1 If the court proceedings are by indictment, the relevant Criminal Code Section pertaining to medical observation can be found in section 543.

answer," i.e. that the Crown has failed to introduce any evidence upon an essential element in its case (e.g. the accused has not been identified as the person against whom the evidence was led). If the judge accedes to the submission, the case is dismissed and the accused is acquitted. Only if the judge finds that there is a case to answer does the defence need to decide whether or not to call evidence. If the defence decides not to call any evidence it has the right to address the court after the Crown. At this stage the defence will allege that the Crown has not proved its case beyond a reasonable doubt. If the defence calls witnesses, the Crown has the opportunity of cross-examining their testimony.

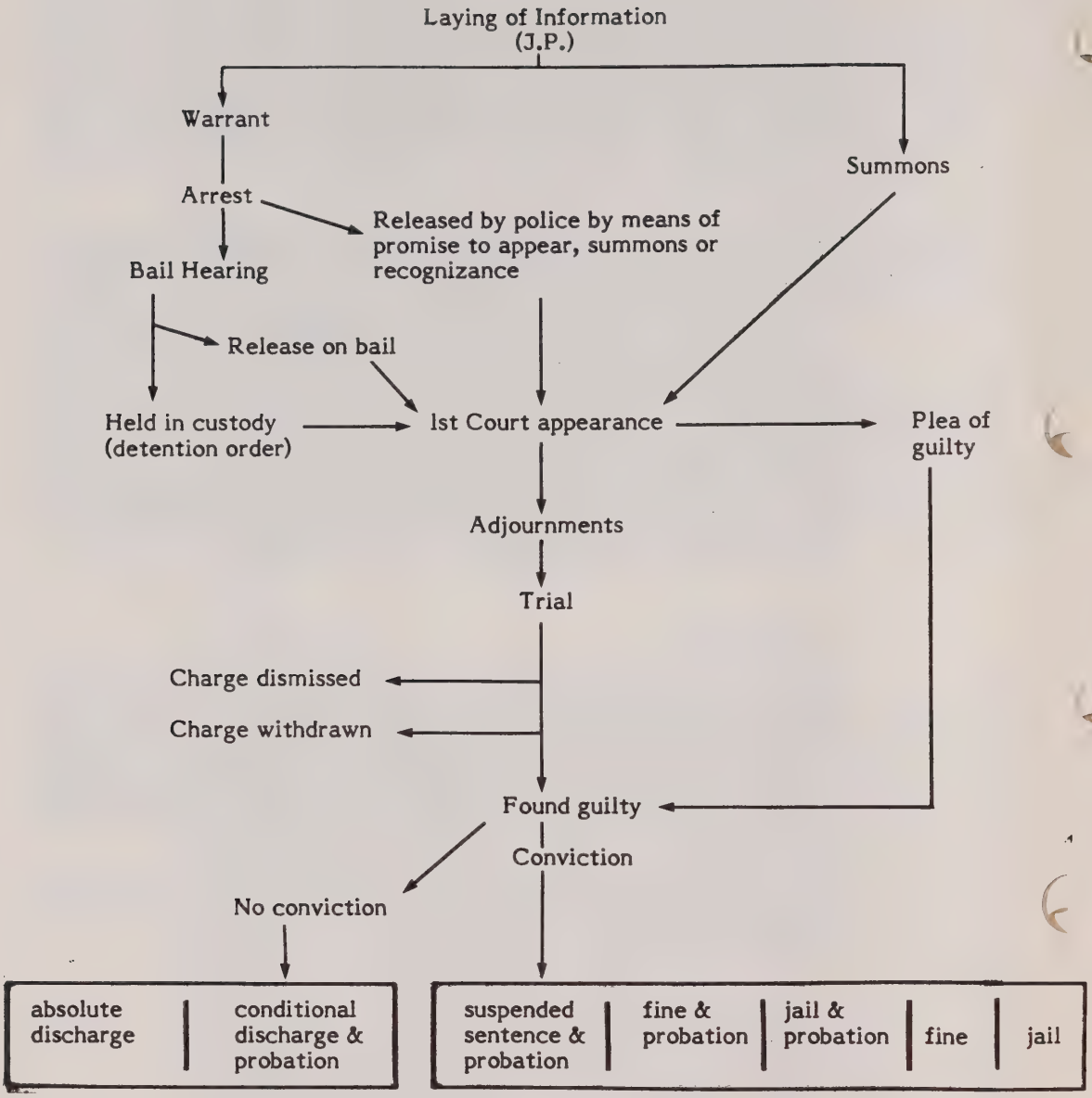
After all the evidence has been produced, the judge must then decide whether a finding of guilt is justified on the weight of the evidence. If the case has not been proven against the accused, the charge is dismissed and the accused is released. However, if a finding of guilt is made, then the defence and Crown have the opportunity of making pre-sentence submissions, or "speaking to sentence." In the case of the defence, this usually involves the presentation of character evidence in an attempt to influence the sentence in favor of the accused. In some cases, rather than immediately sentencing the accused, the judge may adjourn sentencing for several weeks in order to allow for a pre-sentence report to be completed. In some Ontario courts, judges will "stand-down" the case for several hours to permit a "stand-down" pre-sentence report to be prepared, in cases where they feel the inquiry of a full PSR may not be necessary.

7. Plea Bargaining

Often if the accused faces a serious charge, or a number of charges, the defence will negotiate or 'bargain' with the prosecution by offering to plead guilty (and avoid the expense of a trial) if in return the Crown agrees to drop one or more of the charges, or agrees to reduce the charge. For example, if an accused faces a charge of 'assault causing bodily harm', he may attempt to offer a plea of guilty provided the charge be reduced to the lesser offence of 'common assault'.

A more detailed discussion of criminal procedure can be found in "An Introduction to Canadian Procedure," (1976), by Professor Alan Grant, Osgoode Hall Law School, Toronto.

(B) **TRIAL SEQUENCE**



- DISPOSITIONS -

SECTION II

PROBATION LAW (CRIMINAL CODE)

(A) DISPOSITIONS

1. Absolute Discharge
2. Conditional Discharge
3. Suspended Sentence & Probation
4. Fine & Probation
5. Jail & Probation
6. Fine, Jail Alone

(B) DURATION OF PROBATION

(C) WILFUL NON-COMPLIANCE

(D) REVOCATION

(E) SECTIONS 662, 664 AND 666 REVIEWED:
Flow Chart

(A) DISPOSITIONS

A number of possible dispositions are available to the court at sentencing. These are:

1. Absolute Discharge (s. 662.1 (1))

This is the most lenient form of disposition and can be imposed for all offences excepting those carrying a minimum sentence, or a penalty of 14 years, or life imprisonment. The accused is "found guilty," but no conviction is registered. The accused is free to go from court without any further obligations.

2. Conditional Discharge (s. 662.1 (1))

As with an absolute discharge, the accused is found guilty with no conviction; however, he is released from court on "conditions," as prescribed by the court, in the form of a probation order. Conditions of this order may or may not include supervision by a probation officer. Probation orders which do not include a condition "to report to a probation officer, or other person designated by the Court," are commonly referred to as no-reporting orders.

3. Suspended Sentence and Probation (s. 663 (1) (a))

Similar to a conditional discharge, except in this instance, a conviction is registered, and the passing of sentence is suspended subject to the offender's good behavior during a specified period of time. As with the case of a conditional discharge, a probation order is always included with a suspended sentence although there need not be a reporting condition attached to such an order. This type of disposition can be assessed for all offences except for those which carry a minimum penalty prescribed by law.

4. Fine and Probation (s. 663 (1) (b))

Probation can accompany a fine, and in such instances, a conviction is registered. (Convictions are in fact registered for all dispositions, with the exception of discharges). Payment of the fine, although stipulated on the probation order, is not a probation condition as such, and hence failure to pay this fine does not constitute a violation of the probation order.

5. Jail and Probation (s. 663 (1) (b))

i) A period of imprisonment, not exceeding two years ~~less a day~~ can be followed by probation, which takes effect upon the satisfaction of sentence. (see page 12(B))

ii) s. 663(1) (c) Intermittent Jail & Probation

An intermittent sentence always includes a period of probation, in order to secure the offender's good conduct while he is at large. In such cases, the initial date of probation corresponds to the date the accused is sentenced. Only sentences of ninety days or less can be served intermittently. It should be noted that a period of probation can extend beyond the termination of the intermittent sentence of imprisonment. (See Section XIII, R. v. Weber).

6. **Fine Alone, or Jail Alone**

Possible dispositions utilized by the court can include a fine alone, or period of incarceration alone. It should be noted that although a fine plus probation, or jail plus probation are acceptable under the Criminal Code; a fine plus jail plus probation is not. A court can impose a fine plus a jail sentence. Although a fine plus an intermittent sentence is considered unacceptable, these have occurred. Officers are advised to consult with the Crown or Legal Branch in these instances.

For a more detailed description of the relevant Criminal Code Sections governing probation, refer to sections 662-666.

(B) DURATION OF PROBATION

A probation order cannot remain in force for more than three years. With the exception of probation imposed following a jail sentence, (s. 663 (1) (b)), the probation order takes effect the day it is made, and runs its full course according to the calendar. Unless the court revokes or terminates the order early, the order "runs the full distance" no matter what the status of the probationer.

As the Criminal Code does not allow for "post-dating" probation, a probation order cannot be made to run consecutive to another order. In the case of jail plus probation (s. 663 (1) (b)) the expiry date of the period of incarceration is considered to be the date the offender has satisfied his sentence, and hence usually corresponds to the date of the release. However, in the event that an offender placed on probation pursuant to (s. 663 (1) (b)) is paroled, the starting date of his probation begins on the date that his parole is successfully scheduled to terminate.

(C) A NOTE ON CRIMINAL RECORDS

There is some confusion as to what comprises a "criminal record". Many individuals, including some judges and lawyers are inclined to think that if a discharge is imposed by the court, then the accused does not have a criminal record. This is often based on the notion that only a conviction results in a criminal record. However, in the case of a discharge, although a conviction is not registered, a record of the offence and it's disposition is nonetheless retained. Moreover no matter what the court outcome, local police forces still may maintain a file with details of an accused's criminal involvement. In a general sense, this can still be considered to be a 'record'.

Under revisions made to the Criminal Records Act in 1972, pardons must also be made with respect to a discharge, whether absolute or conditional. In the event of a discharge which was granted pursuant to an offence punishable on summary conviction proceedings, the waiting period is one year following the imposition of the absolute discharge, or the expiry of probation on the conditional discharge. In the case of a discharge processed by means of indictable proceedings, the waiting period is 3 years. Please refer to the Criminal Records Act for more details.

(D) WILFUL NON-COMPLIANCE

When a person placed on probation wilfully fails to comply, or refuses to comply with the conditions of that probation order, he is committing a summary conviction offence under section 666 of the Criminal Code, and can be charged with Wilful Non-Compliance with Probation (also known as Fail to Comply with Probation or Breach of Probation). The exact wording of the code is as follows:

666 (1) "An accused who is bound by a Probation Order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction."

The maximum penalty that the court can impose on such a charge is 6 months in jail or a $2,000 fine, or both.

(E) REVOCATION

s. 662.1 (4) (conditional discharge plus probation).

In an instance where a person has been granted a conditional discharge plus probation, and while on probation, has been charged and convicted of a subsequent offence, the court that made the order,[1] may: revoke the discharge, convict the accused on the original offence, and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged. Officers should also be aware that the court also has the option of proceeding under s. 664 (4) e. (See below.)

s. 664 (4)

In instances when a person has been granted a suspended sentence and probation, finds himself charged and convicted of a subsequent offence while still on probation, the court may:

s. 664 (4) (d) revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or

s. 664 (4) (e) make such changes in, or additions to the conditions of the order, or extend the period of the order, not exceeding one year.

If a person had originally been sentenced to jail plus probation, then only s. 664 (4)(e) applies.

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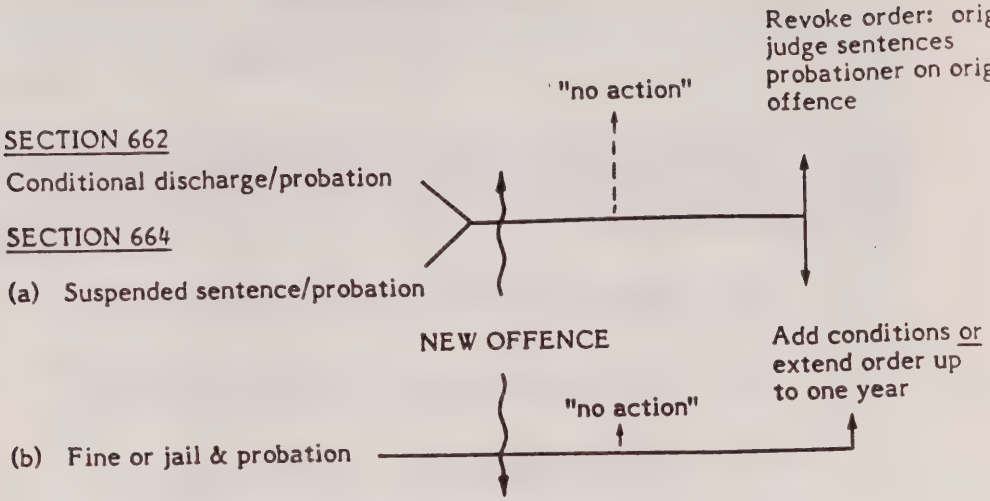
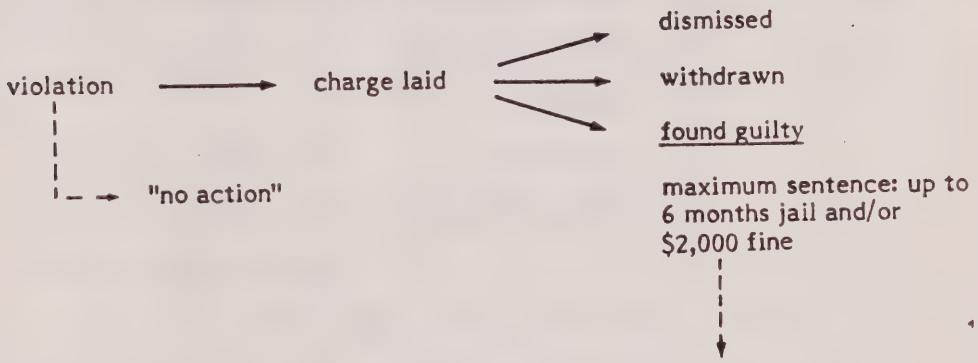
1 "The Court that made the Order" also refers to the court to which jurisdiction has properly been transferred.

(F) SECTIONS 662, 664 & 666 REVIEWED



SECTION 666 (Fail to Comply)



A conviction under s. 666 is considered a subsequent offence, and the court can elect to proceed with revocation, but only in cases where either a conditional discharge or suspended sentence was given originally.

SECTION III

LAWS OF EVIDENCE

(A) SOURCES

(B) DEFINITION OF EVIDENCE

(C) BURDEN OF PROOF AND STANDARD OF PROOF

(D) CANADA EVIDENCE ACT

1. Competence and Compellability
2. Privileged Communication
3. Protection Against Self-Incrimination
4. Best Evidence Rule
5. Hearsay
6. Statements
7. Character Evidence

LAWS OF EVIDENCE

(A) SOURCES

To ensure that the criminal justice process remains fair, and to minimize abuse of the citizen within that process, the presentation of evidence, as well as what comprises evidence, must follow a strict set of rules and standards. There are a number of sources for the rules of evidence in Canadian law. These are:

1. The Canada Evidence Act
2. Ontario Evidence Act
3. Statutes containing their own rules
4. Case law incorporating common-law rules

(B) DEFINITION OF EVIDENCE

"The testimony of witnesses and the presentation of writings (documents) and objects (exhibits) which are permitted to be used as proof in a legal proceeding."

Proof is supplied through evidence, which in the case of a criminal proceeding must:

1. identify the offender (who)
2. show that the offender had intent to commit the offence
3. identify the offence (what)
4. identify the date, time and place of the offence (when & where)[1]

In terms of a wilful non-compliance with probation, the "who, what, when and where" of the evidence must establish the identity of the probationer, identify the alleged violation, and the time and place of the alleged breach. This is accomplished through testimony either through the evidence of witnesses, or by the presentation of documents, letters, ledgers, and so on. Specific information on what comprises evidence in a wilful failure process is covered in the section on 'proof'. (Section IV)

(C) 1. Burden of Proof

The onus of proving a matter is referred to as the burden of proof. In criminal cases as a general rule the burden of proof always rests upon the Crown. Only in exceptional cases does the defendant ever have to bear the burden of proof (e.g. alleging insanity). In all other cases the

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1 Date of the offence is very important in summary conviction proceedings under the Code. There is a six month limitation of action which is measured from the act alleged to be an offence to the laying of the information. (s. 721 (2) Code).

Crown must prove what it alleges and all the accused needs to do is adduce some evidence which raises a doubt about this guilt.

2. **Standard of Proof**

In situations where the Crown bears the burden of proof, evidence must be presented which convinces the court of the accused's guilt beyond a reasonable doubt, in order to succeed in obtaining a verdict of guilty. This is referred to as the 'standard of proof'. In the exceptional cases where the burden of proof is carried by the defendant, the standard of proof is less rigorous and corresponds to the civil standard of proof, based on a balance of probabilities. In such cases the court must be satisfied that it is more likely than not that the issue in contention took place.

(D) CANADA EVIDENCE ACT

This is a federal statute which provides for the rules of evidence applicable to all criminal trials. Some of its more important tenets are outlined in the following discussion.

1. **Competence & Compellability**

First, several terms requiring explanation: An accomplice is any person who is involved in a crime to the extent that he could be charged as a "party to the offence" to that crime. Whether a person has or has not been charged has no bearing on his position as an accomplice. When two or more accomplices are charged jointly in the same information, they are considered to be co-accused. In the event that two co-accuseds have separate trials, or are charged separately, they are no longer co-accused persons, but revert to the status of "accomplice." When an accomplice is used as a prosecution witness, his case should have been decided prior to his appearance as a witness.

A competent witness is a person who is permitted or qualified to give evidence. All persons are competent, with the exception of the following:

i) A mental defective, lunatic, or insane person

ii) A drunken person (until he sobers up)

iii) The accused, co-accused, or their spouses in certain situations

Children under the age of fourteen are considered to be competent if they are deemed to understand the nature of the proceedings and appreciate the taking of the oath. If in the judge's opinion a child of tender years is sufficiently intelligent and understands the duty of speaking the truth, then the court can receive his unsworn testimony. (The court does require corroboration for such unsworn testimony, however).

A compellable witness is a competent person who is required to attend court, and testify when called upon to do so. Failure of a compellable witness to testify comprises contempt of court. The Queen or her representative, or foreign ambassadors are not compellable. As well, the accused and co-accused are never compellable, and the spouse of either is seldom compelled to testify. However, in the case of a spouse, there are certain offences, such as those listed in s. 4(2) of the Canada Evidence Act, in which he or she is both competent and compellable. Examples of offences under this section include Contributing to Juvenile Delinquency, Indecent Act (s. 169 cc), Criminal Neglect of Family (s. 147, 200) and others. A spouse is also a compellable witness in various "spouse vs. spouse" offences (e.g. Wounding, Assault, Threatening) where the life, health, or liberty of the victim spouse is at stake. A spouse is held to be compellable in any matter pursued under the Ontario Evidence Act; or in any civil dispute.

2. **Privileged Communication**

The Canada Evidence Act describes a number of relationships wherein communication is privileged and not subject to disclosure in open court.

i) Husband & Wife

Even in instances where one spouse is competent and compellable against the other, he or she is not compelled to disclose any communication which passed between them during the marriage. This privilege terminates with the dissolution of the marriage.

ii) Lawyer and Client

Anything a client says to his lawyer (including written communication) concerning the matter for which the lawyer was retained, cannot be disclosed by the lawyer without the client's consent. This refers only to communication made in the course of the professional relationship and does not cover information received during casual conversation.

iii) Police and Informant

iv) Public Interest and Security

Government correspondence and communications which would not be in the public's interest are privileged.

Note: Communications between a probation officer and his client are not privileged. As well, communications divulged to a member of the clergy is also not privileged, although the court's practice has been not to force disclosure of such communications.

3. **Protection Against Self-Incrimination**

There is no law in Canada which excuses a witness from answering all questions on the grounds of self-incrimination. He must answer all questions, but has the right to seek protection under section 5 (2) Canada Evidence Act, and 9 (2) Ontario Evidence Act, which dictate that the answers he gives are not receivable in evidence against him in any criminal proceedings against him thereafter, or any civil procedures under any act of the legislature (O.E.A.).

4. **Best Evidence Rule**

The primary or original evidence, whether witnesses, documents, or objects must be presented to the court as the best proof of a fact unless:

i) it is not feasible or reasonable to present it, or

ii) if some specific rule permits it, then secondary (substitute) evidence can be permitted.

In this latter category, drug analysis certificates, certificates of conviction, and bank records, can be used in certain circumstances. Following from this "Best Evidence Rule" it follows that the best way to prove a case is by the direct evidence of a witness who can prove the case in its entirety. Such a witness can identify the accused, testify as to the offence itself, as well as being able to testify as to the time and place of the act in question.

5. **Hearsay**

The general rule of hearsay is summed up in the following extract:

> "Evidence is not admissible through the mouth of one witness to show what a third person said for the purpose of proving the truth of what that third party said, because

i) to admit it would be to accept the statement of a person not under oath, and

ii) because that person could not be cross-examined on his statement."

There are a number of statutory provisions which permit what would be hearsay to be used in court. Certificates of conviction, analysis of drug cases, driving suspensions, and transcript evidence are examples. There are a number of exceptions to the hearsay rule. Some of these are:

i) dying declaration

ii) declaration in the course of duty by a deceased person

In relating hearsay evidence to a wilful non-compliance, A.W. Dunfield suggests:[1]

> "With few exceptions you must never tell the Court what you know from talking with another person. The way to deal with such information is to relate to the Judge what you did as a result of obtaining the information,and the generally accepted way of doing this is to say "As a result of the information received, I did..." [1]

6. Statements

Subject to certain rules, statements made by someone other than the witness, can be admitted (such as statements made by the accused). Some texts deal with such evidence as exceptions to the hearsay rule, and others include them under a separate topic of "self-incrimination."

> "It is important for a probation officer to know that question-answer sessions between the probationer and the officer can, under appropriate circumstances, be relevant and admissible evidence in a wilful failure case.
>
> e.g. Say a probationer has an "abstain from alcohol" condition and repeatedly smells of drink on reporting. Admissions by the probationer to the probation officer of having been drinking could, in certain circumstances be excellent for the Crown.
>
> The law on admissions and confessions is technical. Briefly the court will admit such evidence if it is voluntary and that will depend upon whether threats or inducements were held out to the accused by a "person in authority".
>
> This raises a number of questions. Is a P.O. a "person of authority"? How does a court satisfy itself that the admission or confession was voluntary? There is no clear law on the first point but indications are that, in the circumstances of the relationship, a Probation Officer would be regarded as a "person in authority" and should therefore avoid any line of questioning of a client who is to be "breached" which might be understood by a court as a "threat" or an inducement to admit some wrongful act. The court will hear all the circumstances in a contested case in a "voir dire" or "trial within a trial" to determine whether to admit any such statements in the trial of the issue. Good notes of any such interview taken at the time by the

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1 Dunfield, A.W.: "Probation Litigation - A Primer", Page 74

Note: For using communications between P.O. and client as evidence, see next section on "Statements".

Probation Officer will probably help the case. In addition, consideration should be given to cautioning the probationer that he is not obliged to answer the questions and that his/her answers may be given in evidence. Canada does not have any formal Judges rules (as does England) or Miranda warnings (as does U.S.A.) but a caution usually helps to show that any statement made by a probationer thereafter is a "voluntary" one within the meaning of the "admission and confession" case law. The giving of a caution, however, is not conclusive, i.e. the confession may be voluntary although it was not given or it may be ruled out on the voir dire although it was. It all depends on the judge's discretion having regard to all the circumstances in which the statements came to be made."

7. **Character Evidence**

The Crown cannot generally introduce evidence of bad character during the trial for the purpose of showing the accused as being the "type of person" likely to have committed the offence in question. In a number of offences, (e.g. 175 (1), 193 (1)) it is permissible to make exceptions to this rule, although none of these exceptions would have any bearing in a proceedings of wilful non-compliance. However, if the accused brings out evidence of good character during the trial, the Crown is then permitted to rebut it by introducing evidence of poor character. Any witness who testifies, however, may be examined as to previous criminal record, for the purpose of attacking his credibility.

After the trial, and before sentence is passed, the court can hear character evidence, in order to assist it in determining sentence. Criminal records and pre-sentence reports are therefore allowed at this juncture.

SECTION IV

PREPARING YOUR CASE (1): WILFUL FAILURE UNDER THE CRIMINAL CODE: WILFULNESS & PROOF

(A) THE ISSUE OF DISCRETION

(B) TWO PRINCIPLES: WILFULNESS AND PROOF

1. Wilfulness

   i) defining wilfulness

   ii) assessing wilfulness

   iii) imprecise conditions and Wilful Failure

2. Proof - The Facts to be proven

   a) who, what, when, where

   b) proper case recording

   c) requirements for proof

(C) SOCIAL/ATTITUDINAL FACTORS IN DISCRETION

(D) POSSIBLE REMEDIES

(E) DISCRETION: A SUMMARY

THE ISSUE OF DISCRETION

The choice on whether to proceed with a charge of wilful failure is one of the most difficult aspects of probation decision-making. This is not only the case in probation, but throughout the whole criminal justice and correctional process, there are a number of points where the use of discretion is applied. Police officers, justices of the peace, crown attorneys, judges and parole boards, all at some point or another make choices which will affect the involvement of the citizen in the criminal justice process. By the time a person is granted probation, he or she has already passed through a number of discretionary filters. Moreover, once a probation officer lays a charge, the offender is refunnelled through the same discretionary route from which he came. As in other judicial and correctional sectors there are different views among probation officers as to what the limits of their discretion should be.

While some officers feel that they have total scope in deciding upon which factors a violation should be brought back to court, there are also others who maintain that the probation officer's role is to monitor the probationer and to bring all violations to the court's attention. This latter approach rests on the point of view that a condition of probation is a strict court order and that since it is the court which has imposed these conditions, it is ultimately the court which must be burdened with interpreting guilt or innocence in a case of wilful failure. We feel that the probation officer is no less capable than any of the other decision-makers in the criminal justice-correctional process in selectively applying the law to individual cases. Consequently we feel that since it is the probation officer who decides whether to initiate court proceedings, they must develop a model which will allow them to analyze all the aspects of a violation, and its attendant variables, so that a decision to lay a charge is based on an objective and explicit consideration of the case. While it may be difficult to quantify and measure such components as "fair play" and "justice", in a neat formula which answers the question "do I charge or don't I"?, there are nonetheless a variety of steps of analysis which a probation officer can undertake to ensure that discretion is used fairly and consistently.

Before examining the concepts which underlie the prosecution of a wilful failure, new officers should familiarize themselves with the particular enforcement ground rules which may exist in their own area. In some jurisdictions, Crown attorneys require that the probation officer notify them of all violations, while in others, the bench leaves all decisions on enforcement up to the probation and parole officer. As well, in some areas, decisions to enforce must be made in consultation with the area manager, or the office "team". New officers, no matter how well versed they may be in the theory of law and social work, are also strongly recommended to consult with the more seasoned officers in matters of enforcement, for it is past experience and common sense that combine to provide the best teacher.

(B) TWO PRINCIPLES: WILFULNESS AND PROOF

Each case must be judged on its own circumstances and merits. There are, however, two guiding legal principles which emerge in considering whether a case should be returned to court. For any prosecution to succeed, the non-compliance must be:

i) WILFUL, and

ii) PROVABLE

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1 In fact the law does not require that the Crown's permission is required to lay a charge of wilful failure.

It is simply not enough to decide that a probationer "deserves" to be charged; for without establishing that the violation is wilful and provable in court, there may be no point in proceeding any further.

1. Wilfulness

i) Defining Wilfulness

In most offences, the accused must be shown to have a "guilty mind" or mens rea. This criteria is expressly spelled out in the section on breach where the accused must have "wilfully failed or refused to comply" with the probation order. A wilful act must not only be inferred by the probation officer, but in order for a successful prosecution of the breach to occur, the element of wilfulness should be clearly demonstrated.

Webster defines a wilful act as one done intentionally or deliberately. The Canadian Criminal Code, in section 386, describes a wilful act as taking place when someone

> "...causes the occurrence of an event by doing an act or omitting to do an act that is his duty to do, knowing that the act or omission will probably cause the occurrence of the event,..."

Although this particular definition relates to property offences, it does nonetheless give a picture of how the Code views wilfulness. If we replace the word "event" with the word "non-compliance charge", and replace the word "act" with "failure to pay restitution" we get a flavor of such a definition as it may relate to a s.666 charge:

> "...causes the occurence of a non-compliance charge by doing an act (e.g., consuming alcohol) or omitting to do an act (e.g., not reporting), knowing that the act (e.g., not reporting) will probably cause the occurrence of a non-compliance charge..."

While the various cases[1] and law texts show some inconsistency in the interpretation of the word 'wilful', and the ultimate judging of whether an act is wilful or not will depend upon the individual judge's perceptions, it would probably be safe to assume that, given the tone of section 386 above, wilfulness would be satisfied if it can be demonstrated that a probationer:

1. knows what he is supposed to do, (or not to do),
2. is aware of the consequences of non-compliance,
3. intends the act of non-compliance to take place, and
4. is capable of complying with the condition.

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1 See R v. Kent (in reported decision, County Court of Winnipeg, 28 February, 1983), for a discussion on the definition of mens rea in s. 666 cases.

In some situations, such as failure to pay restitution, or to report, intent is not so much a conscious expression of wilful disobedience, but rather a case of neglect or irresponsibility. In such cases, it would seem that wilfulness could be demonstrated by showing that the probationer was aware of what was required, had knowledge of the consequences of such behaviour, and had the power to conduct himself in accordance with the expectations of the court. This reasoning appears consistent with the judgement rendered by the Saskatchewan Court of Queen's Bench in McKenzie, where mens rea was inferred from the fact that the court ordered that restitution be made, advised the accused of the potential consequences of non-compliance and that the accused had obtained two extensions of the time to pay.

ii) Assessing Wilfulness

In terms of a breach of probation, certain questions may be asked in assessing wilfulness. In addition to using basic common sense, these are:

1. Is the probationer aware of what conditions he is required to adhere to?

2. Does he fully understand the condition in terms of the expectations which it imposes on his behavior?

3. Is the client aware of the legal consequences of failure to comply?

4. Is the violation a reflection of a conscious effort to engage in non-compliant behavior?

5. Is the client capable of complying with the condition, or are there physical, social, psychological or financial hindrances to compliance?

6. To what extent are the probationer's explanations reasonable?

7. Other: _____

_____

_____

iv) Imprecise Conditions & Wilful Failure

It has already been mentioned that one of the questions a P.O. should reflect upon when assessing the wilfulness of a violation is that which asks whether the probationer fully understands the conditions in terms of the expectations which it imposes on his behaviour. (See Question #2 above.) This question merits further examination because, often in the case of imprecise conditions, there may arise situations where the P.O. and client have two completely different views of what behaviour is proscribed. This is demonstrated

through an example where a probationer is prohitited from the "excessive use of alcohol". During the initial interview, the P.O. explained simply that the client "had better not drink too much". However, a social drink for one person may be a glass of wine, and to another, it may be a 40 "ouncer" of scotch. The court on the other hand, may have another idea of what constitutes "excessive" alcohol use. As everyone may have differing notions of what constitutes excessive use, the parties (the P.O. and the client) must sit down and define the ground rules, if they are to avoid second-guessing each other. In using discretion wisely, the P.O. may find it useful to define these ground rules based on an interpretation of the prevailing social values, rather than arbitrarily imposing his own personal viewpoint as "law". Ideally, the probationer should walk away from the office knowing exactly what behaviour or actions will be interpreted as "excessive use of alcohol". The same can be said of other imprecise conditions such as, "not associate with people with criminal records", "make reasonable efforts to find and maintain employment", "not leave the jurisdiction of the Court", and so on.

The best tactic in dealing with vague conditions is the one which brings the matter back to Court in the form of an application for variation. With those conditions that are not so vague, the P.O. should examine that the communication between he and the client is clear, and that they both have a common understanding of what the conditions mean.

2. Proof: The Facts to be proven

Mens rea, in the form of wilfulness is but one of the two essential ingredients in a criminal case.[1] The second important component is actus reus, the specific act, for which a criminal sanction is imposed. Therefore in order to demonstrate actus reus as well as mens rea certain facts must be determined and subsequently demonstrated to the court. These are:

i) WHO . . . . the identity of the accused

ii) WHAT . . . . the violation

iii) WHEN & WHERE . . . . the time & place of violation

iv) INTENT . . . . wilfulness must not only have been shown to exist; it has to be proven as well.

These facts are presented to the court through the testimony of witnesses and the presentation of written documents, and according to the various laws of evidence. Without sufficient available data on any of the above issues, proof in court may be difficult.

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1 These are, of course, a diverse range of offences which are deemed to be 'strict liability' offences, in which the mental element plays no role. These offences, which fall mainly outside the Criminal Code only require proof that the act occurred in order for a finding of guilt to be made.

(a) Who

Courts can require that the probationer be identified as the person placed on probation, as well as the person responsible for committing the breach. Professor Grant offers the following guidelines:

> "The question of identifying the probationer is theoretically simple but can create problems in practice when a wilful failure to comply is denied and the accused is unwilling to make any admissions of any of the facts to be proved. In such a case the best evidence would be the production of a certificate of conviction by a person present in court at the time of the conviction. This person would be able to identify the accused as the person named in the certificate of conviction. Ideally this witness (say the arresting officer) should be present when the accused appears for his trial on the wilful failure.[1]
>
> In the absence of the identifying officer it may be that some police officer assigned to court duty at the particular court can identify the accused. Failing this, some evidence of identity can be introduced by having the probation officer to whom the accused was assigned testify that he showed the probation order to the accused who admitted that he was the person named therein and also identified that the signature appearing thereon was his. As long as there is some evidence to identify the accused as the person to whom the condition in the probation order applied, it will be for the court to rule on whether the mode is sufficient. Unless we are to accept that a large number of probation orders are totally unenforceable it would seem reasonable to attempt to identify the accused in this way if no more direct evidence (by a person actually present at the conviction or signing of the order) is available."

With respect to identifying the probationer as the party responsible for the non-compliance violation, witnesses such as the police, probation officer, agency person or family member will have to be called upon to provide testimony. There is little point in pursuing a curfew violation for example, if the complaining parents who reported the violation are unwilling to testify in court.

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1 To find out who the original arresting officer was, the P.O. can request a court official to look up the original information which alleged the offence which resulted in probation. The name of the original police officer will often be noted as the informant in the case. In jurisdictions where police informations are sworn by the equivalent of our Court Liaison Officers, the name of the original arresting officer can be obtained by contacting the informant.

What, When, Where

The "best evidence" rule requires that only persons who have direct knowledge of the breach can give evidence. Hearsay is not permitted. Restitution ledgers, agency records, and affidavits may be permitted, but are "second-best" and not ideal.[1] (See also section III, p. 19.)

Intent

The violation has to be wilful. Questions determining wilfulness must be satisfied and case records should bear this out.

(b) Proper Case Recording

A reading of the case should give the reader a clear idea of the client's activity. If an officer perceives that a particular case may eventually present a difficulty, it might be a good idea to take extra pains to record the content of the interviews in sufficient detail. This should include; the dates, place, what you said, and what the client said, indications of the client's manner and attitude. To ensure accuracy, case recording should take place soon after the interviews. Telephone conversations should be recorded in a similar manner. It is sometimes helpful to record quotes from the client such as "I ain't gonna do any of this mickey-mouse community work". Such statements can give you a good sense of the case later on when you may wish to assess the client's overall attitude in terms of a possible breach, as well as conveying this attitude to the court, should the matter eventually go to trial.

(c) Requirements for Proof

There are a number of basic ingredients for 'proof'. These requirements, in question form, are as follows:

i) Have the instructions given to probationer been clear and understandable? To what extent has the violation been due to a lack of proper communication?

ii) Has the wilful failure been properly recorded and documented?

iii) Are the necessary witnesses prepared to testify in court?

iv) Are the necessary documents available, and in order? (More about this in Section V).

v) Do the facts of the non-compliance activities actually satisfy a violation of the condition as stated in the order?

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1 Current Toronto practice now suggests that restitution ledgers cannot be submitted as secondary evidence, and the restitution clerk may be called upon to appear in court in person, accompanied by an affidvait sworn by the restitution clerk.

(C) SOCIAL AND ATTITUDINAL FACTORS IN DISCRETION

Until now, we have dealt with only one aspect of wilful failure, namely its legal sufficiency - what the law requires in order to secure a finding of guilt. However, in considering whether a charge should be initiated, there are a number of other factors that need to be taken into account. These are the factors which address two questions; 1. Is it in the best interests of the probationer? 2. Is it necessary in the public interest (for the protection of the community)?

In order to address these questions effectively, one must look beyond the actual violation and consider the various attitudinal and social dimensions of the case. For example, even where sufficient wilfulness and proof exist, the officer may choose not to proceed for a variety of reasons. Breaches which might not indicate court action could include instances of behaviour where:

1. The violation is not representative of an ongoing negative behaviour.

2. The violation is an isolated act, not deemed likely to re-occur.

3. The probationer's excuses are reasonable, or the facts or circumstances around the violation leans towards giving the probationer the "benefit of a doubt".

4. The condition of probation is highly unreasonable, and does not have effect in ensuring the good conduct of the probationer. A curfew condition imposed on a stable 32 year old would be one example of such a condition. (Problems with these types of conditions should be discussed with the area manager, Crown, or Legal Services Branch.)

5. The violation is minor, and a section 666 charge would serve the interests of no one.

In situations where the Probation Officer is able to discuss the breach with the probationer, the following course of action might be suggested:

> "The first thing to do when you have a non-compliance situation is to confront the probationer and ask him for an explanation of his actions (or failure to act, as the case may be).
>
> Since the Crown must prove its case beyond a reasonable doubt you should consider any explanation offered by the accused with an open mind. He may be in a position to provide a reasonable explanation for his failure to comply, or at least one that goes to the issue of wilfulness.
>
> In cases where the failure to comply occurs with such frequency as to take it out of the "isolated act or omission" category, you must decide whether the breach is wilful and thereby the basis for a s. 666 prosecution - or if it is non-wilful and is more accurately a situation where variation of the order might be well sought to restore the balance of expectations/capacities which will allow the probationer to successfully complete the order.

> If the condition breached is one the probationer is capable of abiding by and you question him about it, he may offer you a plausible explanation. If that is the case you may wish only to caution him and note the time and place of your discussion, and that he was cautioned with reference to continued or other acts of non-compliance. Common sense goes a long way when you are evaluating the intention of an accused. You, as well as the courts, operate within the parameters of reason and fairness, so make your decision and get on with it." [1]

The probation officer must clearly consider that as long as other means are available for bringing the probationer "into line", a charge of wilful failure should be considered a last resort. Nevertheless there will be situations where immediate court action may be the only means available to ensure that the interests of the court and the community are safeguarded. Breaches which are flagrant violations of the court's order, or those which represent dangerous behavior by the client may merit an immediate return to court. In some cases, returning a person to court may be the only alternative in attempting to control or moderate the client's unacceptable behavior.

In assessing a "tolerance level" for initiating action under s. 666, probation officers should be guided by Ministry policy:

> Minor violations can usually be resolved directly by the probation officer without reference to the Court for legal enforcement. Giving advice or a caution, increasing the intensity of surveillance or supervision, applying to the Court for additional or varied conditions, and referring to an appropriate programme or agency may all be considered to the extent that public safety is not threatened and the possibility of successful adjustment exists. . . .Persistant or serious failure or refusal to abide by probation conditions, non-payment of restitution and non-performance of community service for example, or continued non-reporting, should result in enforcement action.[2]

(D) POSSIBLE REMEDIES

There are a number of remedies, other than laying a wilful failure charge that must be considered. These include:

a) A warning or caution given to client.

b) Clarifying with the client that he understands the conditions of his order, and that the instructions to him as to what is acceptable, and what is not, are clearly understood.

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1 Reprinted from 'Probation Litigation - A Primer', with the permission of the author, A.W. Dunfield.

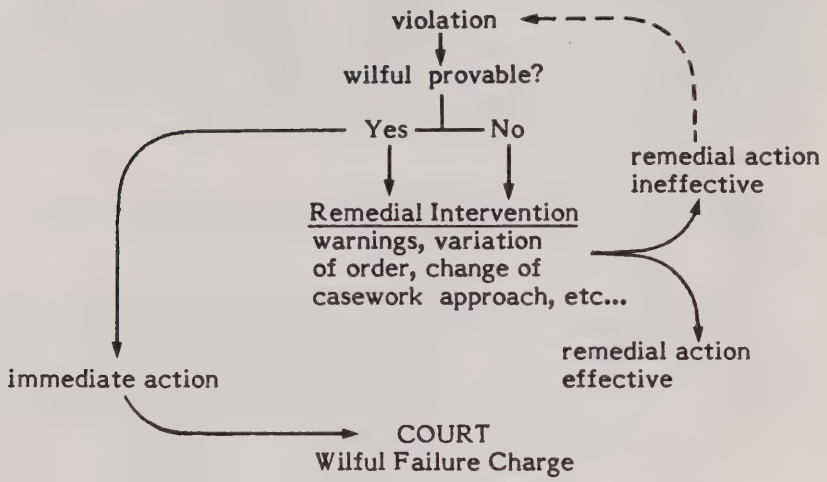
2 Probation & Parole Manual, Section I, p. 1.18.

c) Applying to the court for a variation or deletion of the condition, in situations where, in the probation officer's opinion, compliance is unfair or impossible.[1]

d) A change in the casework approach; perhaps "contracting" with the client, or adopting another approach, i.e. non-directive counselling.

e) Increasing the level of surveillance or supervision.

(E) DISCRETION: A SUMMARY



SUFFICIENT WILFULNESS/PROOF		INSUFFICIENT WILFULNESS/PROOF
• instructions clear • excuses unreasonable • capable of compliance • understands responsibilities	INTENT	• instructions, expectations vague • excuses reasonable • incapable of complying
• case properly recorded • witnesses/documents available	WHO WHAT WHEN WHERE	• improper or insufficient case records • witnesses/documents unavailable

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1 The Ministry of Correctional Services Act, 1979, Section 43(2) now recognizes that probation officers may apply to the Court for a variation of a condition "where the probation officer is of the opinion that compliance is inconvenient or impossible."

SETTING THE CONTRACT IN PROBATION

by Edith Ankersmit

As a probation officer, I have found that the social work concept of setting the contract gives clarity and direction to my work. This concept has proved very useful in social work and other forms of counseling for many years. Setting the contract simply means reaching agreement with the client as to what goals he will work toward achieving. I believe that other probation officers working with offenders could use this concept to avoid feeling overwhelmed and discouraged by seemingly unmanageable caseloads.

While my focus in this article will be on the adult offender, the same principles would be of interest to the juvenile probation officer. The contract could be set with the juvenile offender alone if he is nearing emancipation. With the younger juvenile, often the contract has to be set with the entire family.

This article considers first the task of dealing with the probationer's resistance and feelings. The question of the probation officer's power is explored. Then three possible types of contracts that can be made with the probationer are out-lined. And finally, a system of setting priorities in caseload management is offered, based upon the type of contract made with the probationer. A central concept throughout is the inclusion of the probationer in the planning.

Is the Legal Contract Enough?

What is the contract between probation officer and probationer? Often it is not clearly spelled out. The usual procedure is to go over the written order of probation with the probationer during the first interview. But does this legal order define the contract? I believe it sets the contract's legal boundaries, but within these boundaries the client and the individual probation officer can still determine what is to transpire between them during the period of probation. Within the framework of the legal contract, the probationer and I usually formulate a verbal contract dealing with the individual probationer's particular goals and responsibilities. Some probation officer may prefer a written contract, especially with the probationer who needs structure, such as the immature or confused probationer.

Dealing with Resistance

In various settings the social worker helps the client address the questions, "Why am I here?" and "How do I feel about being here?" Let us first look at other settings for precedents. In child welfare the answer to the first question may be that a child is in placement. In counselling the client may come for help with marital problems. In both these situations the crucial question is how the client feels about coming, and the social worker deals with these feelings. In probation the answer to the client's question "Why am I here" is always the same: because the judge has placed him on probation for an offense. Here, too, the more crucial question then becomes, "How do I feel about being here?"

Extracted from: Federal Probation (1976)

Since an honest answer to this last question almost always involves many negative feelings, dealing with the client's resistance toward his situation becomes a primary task. Resistance must be dealt with freely and openly before any genuine contract can be made. The probationer should be allowed to ventilate his hostile feelings toward probation, police, parents, and authority in general. This is not to be interpreted as allowing the probationer to make excuses for his behavior, but at this early stage, non-judgmental listening is essential. It greatly strengthens a relationship if the client believes that the probation officer is really hearing his feelings. Disillusionment, frustration, hopelessness, anger may emerge. At this stage the probation officer listens and reflects back the feelings. Thomas Gordon's Parent Effectiveness Training[1] provides a good illustration of this technique of "active listening".

A particularly difficult but worthwhile instance of dealing with resistance was the case of John D. He was a young probationer who continually broke appointments, a very clear nonverbal statement of his feelings about probation. Since I couldn't see him, I had no recourse but to write a series of letters. (First letter: "Please get in touch with me . . . ." Second letter: "You failed to respond . . . ." Third letter: "If I do not hear from you immediately, I will take you to court.")

Finally I had an interview with Mr. D. I pointed out that his failure to respond to my letters might have something to do with his feelings about probation. He told me I was just like his "old lady" - always "after" him. He related with glee how he had burned my last letter. He went on to talk about his feelings about former periods of probation, the police, and his father. I listened nonjudgmentally. Finally, at the end of this session, Mr. D., who worked rotating shifts, took out his calendar and set his own appointments. He remained on probation almost a year after this session and never failed to keep an appointment.

Resistance, of course, will continue in various degrees throughout the period of probation. It can crop up in many forms, such as failed appointments or in not following through on plans made. The temptation for the probation officer is to either deny or overlook the resistance, or to berate the probationer. Instead he should clearly point out the resistance and listen for feelings: "You failed your last two appointments. Does that have anything to do with how you feel about coming here?" Of course, if the resistance is expressed in the form of a serious violation of probation, the probation officer will have to take the matter to court.

How Much Power?

It is important to discuss frankly with the probationer how much power the probation officer actually has. Unlike a counselor in a voluntary agency, the probation officer in reality does have a great deal of power, but this may reach exaggerated proportions in the offender's mind.

First, explore the client's fantasy about this power. A somewhat paranoid client may think the probation officer can see into every corner of his life. Women may think they can be penalized for their sexual activities, or for poor housekeeping. Mr. D. thought I could put him in jail for his frank expression of resentment. After the probationer fully expresses his fantasies, I reassure him that these are elements of his private life and (if true) that such matters have nothing to do with the conditions of his probation. If these areas disturb him, he can request counselling.

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1 Thomas Gordon, P.E.T., Parent Effectiveness Training. New York: Peter H. Wyden, Inc., 1970.

The probation officer must then clarify in his own mind what power he actually does have. Of the orders of probation, which does he feel have the highest priority? Under what circumstances would he actually take the client to court? The answers to these questions should be shared honestly with the probationer, which will again help to dissipate unrealistic fears.

The more power the probationer thinks the probation officer has, the more the probationer will resist. The more areas of his life he thinks the officer can control, the more secretive he will be. An admission of limited power paradoxically gives the probation officer more power to be effective. He is no longer the omnipotent parent figure to be resisted at all costs. His frankness helps establish a more trusting relationship, and he serves as a model to the probationer in terms of honesty.

Adult to Adult

If the probation officer is clear with the client about his own priorities and power limitations (i.e., perhaps only conviction of a crime or "dirty" urine tests will lead to a revocation petition), he can avoid the all-encompassing parent role that the client wants to put him in.

Tom, a probationer who had been institutionalized most of his life, expected me to be deeply concerned as to whether he worked or not. I pointed out that maintaining employment was not a condition of his probation - that it was his own choice to find work or to remain on Aid to the Totally Disabled. If he really wanted to work, that could be part of our contract, and I would try to help him find training for employment.

If I had pushed Tom to go to Vocational Rehabilitation, I would have been in the parent role and he would have played the passive-resistive child. In this situation, both the probation officer and the probationer feel helpless. The probationer feels like a child and uses the weapons of the powerless: lying, forgetting, stalling, and just not doing what's expected. The probation officer is the frustrated, helpless parent: "I do everything I can, and he still won't behave."

Setting a contract based on what the probationer wants (within the legal limits of the conditions of probation) brings the probation officer and the probationer back into an adult-to-adult relationship.[2] In assuming an adult role, the probationer must recognize that what happens to him on probation is determined by his own behavior and not by his success or failure in currying favor with his probation officer. In other words, the probationer's participation in setting the contract places him in a position to take adult responsibility for his behavior.

Motivation

When the probationer participates in setting the contract, a key question is, "Is there an area is your life that you want to work on?" A seasoned probation officer once asked me, "How do you get a probationer to want anything?" Of course, there are some probationers who will never share their goals with a probation officer. But I have found it is possible with many offenders to uncover the motivation for working on constructive goals.

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2 Eric Berne, Games People Play. New York: Grove Press, Inc., 1964.

The crucial factors in tapping a probationer's motivation are working through the resistance and clarification of power, as described above. A probationer can be angry at first at being forced to see a probation officer that he will deny he has any problems. Allowing him to express this anger, which is a part of dealing with resistance, is an essential first step. Often just letting the probationer know that he has a choice to accept counseling or not frees him to accept it. For example, I often say, "You're on probation, so you have to see me, but it's your choice as to whether or not you want to use our time to talk about what's bothering you."

Clarification of power is particularly important, because the probationer may believe that anything he says about the subject may be held against him. When discussing the circumstances around an offense, this is true, and appropriate warning is given. However, this limitation need not apply to all circumstances of the probationer's day-to-day life. For example, a man may be deeply troubled about his relationship with his wife. He may be violent with her or merely harbor violent impulses, but never share his concern about this with his probation officer for fear the information could be used against him. This man could conceivable be motivated to work on constructive ways of handling his anger towards his wife if the probation officer initially clarifies the extent of his own power and some trust can be established.

After working through the resistance and clarification of power, I use two specific techniques to put the probationer in touch with the part of him that does want something constructive.

First, there is the use of fantasy. I ask the probationer to describe in detail how he imagines his life will be several years from now. If his fantasy is negative (perhaps he pictures himself in prison), I explore his feelings about this picture. Perhaps he will be disturbed enough to consider his behavior. If his fantasy is positive (perhaps he describes himself with a job and family), I question how he plans to get there. In either case, some motivation may be sparked.

Another technique that I find particularly useful with the sociopathic personality (the hard-core offender who is constantly game-playing and trying to manipulate the probation officer) is similar to the therapeutic paradox described by Haley.[3] I point out to the probationer the advantages he derives from a particular antisocial behavior, such as excessive drinking or continual stealing, getting caught, and going to jail. It is important not to do this sarcastically, but with the full realization that all human behavior is an attempt to meet some person's individual needs.

For example, Tom, who received a Total Disability check, spent it completely within a few days on drinking and partying with his friends. I commented: "I can see why you do this. It sounds like you really have a great time with your friends, and it's one way to keep them with you. It really must be good to have a group of friends. An I can see that when you're broke, it's good to go to your mother and have her take care of you, even if she does complain."

As I openly verbalize his needs, there comes a shift in Tom. He states: "That's true, I do have a ball with my friends, but they don't stick around when the money's gone. I do like to know mom's there, especially because I was sent away so young, but am I always going to run to her?

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3 Jay Haley, Strategies of Psychotherapy. new York: Grune & Straton, 1963.

In other words, as Tom got in touch with the needs that led to his behavior, he began to get some perspective on it. If I had taken the usual route of pointing out the disadvantages of his behavior, I would have accomplished nothing. Tom has heard this line for years and knows very well how to deal with it. Because I pointed out the positive aspects of his behavior, he had to take responsibility for the negative side.

Setting the Contract: Three Possibilities

After the initial resistance is handled and questions of authority are dealt with openly, the probation officer is ready to ask, as previously stated, "Is there an area in your life you want to work on?" The answer to this question - combined with the probation officer's time, expertise, and preferences, and the requirements of the court - will indicate which of three possible contracts is the best type for a particular client. Later I will suggest priorities in caseload management based upon these three types of contracts.

(1) The "Barebones" Legal Contract. - No counseling contract can be made because the probationer does not want counseling. His attitude is clear: "I have to be on probation. I don't like it, and there's nothing I want from you." If regular reporting is one of the legal conditions of probation, the client must still report. But it is explicit that this reporting is routine and that no case-work is offered. The client should be made aware that he must, as must all probationers, take the consequences of his behavior should he run afoul of the law.

(2) The Counseling Contract. - The probationer may want job counseling or marital counseling, or personal counseling, e.g., to learn how to channel his anger in a less harmful way. The simple desire to stop breaking the law because of the unpleasant consequences is a very acceptable contract, and often the only one that can be set with a sociopathic personality. With such an offender it is futile to moralize or preach. A hard-nosed approach about the discomforts of being incarcerated is best. Asking the probationer to talk in great detail about his personal experiences in jail or prison reminds him vividly of the unpleasant consequences of law-breaking.

This contract to stay out of trouble needs to be refined in terms of what specific behavior leads to getting in trouble and what alternatives there are to such behavior. One useful technique is to ask for a step-by-step account of the circumstances leading up to an offense. For example, Bill had a series of arrests for being drunk in public and getting into fights. In exploring the events and feelings leading up to these incidents, I learned that they always occurred after Bill had had a fight with his wife. When Bill and I looked for alternatives, we came up with several, such as going to a friend's when upset or drinking at home rather than in public. We also looked at the possibility of marital counseling to alleviate the basic problem.

A system-wise probationer may set a verbal contract and then not follow through. Tom, for example, said he wanted job training, but week after week failed to keep his appointments with Vocational Rehabilitation. Instead of responding like an angry or disappointed parent who personally wanted Tom to go to Vocational Rehabilitation, I commented, "You stated this was your goal, and yet you don't follow through." This led to an admission that the contract was not genuine, but made only to mollify me.

At that point my role was to acknowledge that the original contract was a false one, and not to continue to push toward vocational rehabilitation. In this case I had no responsibility to push toward this goal, as it was not part of the legal order. I was then free to drop the counseling contract that was based merely on game-playing and to focus fully on the legal contract.

(3) The Supportive Relationship. - No verbal contract is set because the probationer is not capable of it, nor is he receptive to counseling in a goal-oriented sense. Nevertheless, he relies heavily on a supportive relationship. This applies particularly to probationers who fit the schizophrenic or borderline diagnosis. For these probationers the probation officer, if he has the time, can become a very important person.

The work here is mainly in helping the probationer deal with his day-to-day crises. Often these probationers should receive psychiatric help, but refuse it. The probation officer may be the only stable person in their lives. As the mental hospitals close down, more and more of these probationers find their way into probation officers' caseloads. A relationship contract of this sort cannot be explicit. To make the contract explicit might frighten the probationer or injure his pride.

For the probation officer, available time is a critical factor in committing himself to this type of contract, since it is by far the most time-consuming and emotionally exhausting type. The officer must also feel empathy for the particular probationer. The schizophrenic or borderline personality needs, most of all, the experience of a genuine person-to-person relationship.

Setting Priorities in Caseload Management

There has been much talk, and some action, about setting priorities in regard to the amount of time spent with each probationer. This procedure usually involves the probation officer's sitting down with his supervisor, discussing cases, and then making judgments. What I am suggesting is including the probationer in the process, and setting priorities on the basis of the type of contract the probationer is willing to make. Using the contract categories will help the probation officer realize more clearly what can and cannot be done with a particular probationer. It will thus help him to allocate his time more effectively and feel less overwhelmed by the sheer volume of work.

The majority of cases in a large caseload will probably fall into category 1, the " barebones" legal contract. I believe that these probationers, although their behavior is often the most anti-social, require the lowest allocation of supervision time per person. The probation officer should reserve his counseling time for those probationers who want it, and streamline his dealings with those under the legal contract. For instances, with a large caseload of 150 to 200, brief 15- to 20-minute monthly conferences with category 1 probationers are often sufficient. If a probationer repeatedly violates his contract, his probation should be terminated. However, many probationers who fall into category 1 complete their probation satisfactorily. It is an invasion of their privacy to probe more than legally necessary.

Still, there is much that the probation officer must and can do within the legal contract, even with the limited amount of time allocated to each person.

(a) Reporting monthly serves as a sufficient deterrent for some probationers.

(b) Conditions of probation, such as paying fines, restitution, etc., can be dealt with during these sessions.

(c) When there are violations of the conditions of probation, intelligent and informed reports must be given to the court. It is here that the good judgment and diagnostic capacity of the probation officer come into play.

(d) During the period of probation, life crises may occur (i.e., acute marital problems, job loss, etc.). The legal contract probationer ordinarily does not bring his life crises to his probation officer (the officer usually hears from him only when he's arrested). However, if a good relationship is established over time, the probationer under a particularly stressful crisis may come for counseling. At that time, a counseling contract can be set for the particular crisis, either with the probation officer or through a referral.

(e) The probation officer should be aware of community resources and serve as a referral source to employment offices, the welfare department, health agencies, and the like.

Perhaps the probationer and his probation officer set a counseling contract (category 2). I believe that this type of probationer should have top priority on time per person because he is the type most amenable to change. In my particular instance, I had a small intensive supervision caseload and was able to give these people ample time, usually 1 hour a week.

If the probation officer feels he lacks the time and/or the skill to counsel the probationer himself, a referral to another agency should be made - and not simply because the probation officer thinks the probationer needs the service, but because the probationer expresses a genuine desire for it. Such agreement is not always possible if the referral, such as a referral for Alcoholic Rehabilitation, is part of the court order. In this case, the probation officer can acknowledge the probationer's resistance, but point out the reality of the order. This type of probationer really falls into category 1, since his counseling is required rather than chosen freely.

Category 3 probationers, those needing a supportive relationships, are questionable on the priority scale. A probation officer with an intensive supervision caseload can sometimes give the probationer the attention he needs to keep him out of trouble with the law. This often requires home visits and the investment of several contacts a week. But usually the effect of such intensive work is only temporary. If this intensive contact ceases, extreme problems can surface. Joint work with the mental health system is best in handling such clients. Sometimes the combination of a psychiatrist providing medication and the probation officer providing the intensive relationship can be effective.

Conclusion

The advantage of using a casework approach to adult probation is that it promotes clarity for both the probation officer and the probationer. Participation in setting the contract gives the probationer the dignity of being included in the supervision process and encourages him to assume adult responsibility for his behavior. It also removes the probation officer's false expectations of himself and his probationer, and thus hopefully will channel his energies where they are most useful.

Often the probation officer feels disillusioned when he tries to accomplish the impossible. The methods outlined above will help him to look realistically at what can and cannot be done. A probation officer can wear two hats - the hat of legal authority and the counseling hat. Often his frustration comes from believing he is wearing a counseling hat, while the probationer sees only the legal hat. (The probationer may pretend he sees the counseling hat, but his actions soon prove otherwise.) Through mutually setting the contract, both the probation officer and the probationer are clear as to which hat will be worn under which circumstances. Achieving clarity concerning his role with each probationer, and giving top priority to those individuals whose potential for positive change is greatest, can lend substantial reinforcement to the probation officer as he performs a difficult job.

SECTION V

PREPARING A WILFUL FAILURE CASE (II): DOCUMENTS

(A) DOCUMENTATION

1. Essential Documents

   i) valid information

   ii) summons

   iii) warrant

   iv) subpoena

   v) Crown information

2. Other Documents

   i) original probation order

   ii) notice under Canada Evidence Act

   iii) cautioning the probationer re: s.664 and 666

3. Documentation Procedures in Toronto

(B) WILFUL FAILURE CHECKLIST

(C) WILFUL FAILURE - PAPER FLOW

(a) DOCUMENTATION

1. Essential Documents

A number of court documents are necessary in order to pursue the wilful failure charge into the court system. These are:

i) Valid Information

ii) Summons or Warrant

iii) Subpoenas

iv) Crown Information

i) Valid Information

An "information" is the formal legal document supporting the charge. It is a valuable court document and must be present in court whenever the case is scheduled. An information contains data that includes:

a) who is laying the charge (the informant/complainant)

b) who is being charged (the accused)

c) what he is being charged with (the offence)

d) where and when the offence took place

In addition, an information contains a record of court dates, dispositions of each court date and who appears on behalf of the accused and the Crown. When the case is disposed of, the final disposition is marked on the information and is signed by the judge. Section 510 of the Criminal Code outlines more specifically what data an information must contain.

Several offences may be alleged on an information, provided that each is contained in a separate paragraph (called a "count").

An information charging a wilful failure should contain:

a) the description of the probation order (date, judge, court).

b) the date and place of the violation

c) a description of the nature of the violation

For a charge to be initiated, the informant must sign an information as well as swear to the veracity of its content. This is done in the presence of a justice of the peace, who also signs the document. The document duly sworn and signed by all parties then becomes a valid "information."

ii) Summons

The summons is an order of a justice of the peace or provincial judge, addressed to the accused, informing him that he is being charged. It serves as a notice of the date and place he is to appear in court. Often an information and summons are combined together a set, with the original comprising the information, and the copy comprising the summons to the accused. The information segment is retained by the court, and the summons portion is served on the accused by the police. It can be served by mail or in person.[2] (see also "unserved summonses," Section IX)

iii) Warrant

In a situation where the accused's address is unknown, or he is known to have evaded service of the summons, a warrant for his arrest is drawn up. Usually the probation officer preparing the case must explain to the satisfaction of the justice of the peace that a warrant is required. When a person is subsequently arrrested on a warrant, he can be released with a court date by the police, or held over for a bail hearing before a J.P. Once a warrant has been issued, it is entered into the Canadian police information computer (CPIC). This computerized information system allows any police force across the country to check very quickly to ascertain whether a given person is wanted on a warrant. Warrants for summary conviction offences (e.g., wilful non-compliance) often have only a 50 mile radius.

iv) Subpoenas

A subpoena is a court order commanding a witness to attend court at a stated time and place to give testimony. A person who has been served with a subpoena and who fails to attend court as required, is guilty of an offence, unless there is a good reason for not appearing.[1] Once a probation officer has decided what witnesses he requires to give testimony, subpoenas should be prepared and served. In some areas, the P.O. prepares the subpoena, and delivers it to the police for service, and in some areas the police and/or Crown are responsible for both preparation and service of the subpoena. It is not normally necessary to prepare a subpoena until a trial date has been set. As in the case of an information, a subpoena must be endorsed by a justice of the peace.

v) Crown Information ('crown brief')

The crown brief, prepared in advance by the probation officer, outlines for the Crown details of the evidence to be given. Although tradition in each area dictates the form of the crown brief, the generally acceptable outline is one which introduces the

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1 Contempt of Court, Code, 2. 636.

2 When preparing a summons, be sure to include the complete address of the accused. In rural areas, lot and concession numbers should be specified.

anticipated evidence of each witness.In most situations this can be handled on a single page. A more detailed "dope sheet" should "develop" the evidence in a chronological and understandable fashion.
It should:

a) Introduce details of probation order (name of court, judge, offence, date, conditions). P.O. can usually testify to this.

b) Identify the accused, e.g. "Pc. John Law, Waterloo Regional Police, will identify the accused, John Doe, as the person convicted of Mischief on November 21, 1976, and placed on probation.

c) Evidence on the Violation, a chronological accounting of the warnings, instructions given to accused in order to facilitate his compliance with the order, as well as information attesting to the 'wilfulness' of the breach, and his acts or omissions which constitute the breach.

vi) Crown Envelope (confidential instructions for Crown folder - form D1416, or CA 017)

This is an envelope or folder used not only as a handy item to hold all the necessary court documents (information, warrant, Crown sheet, etc.) but which also serves to highlight a number of valuable bits of information on its cover:

Some of the information which can be noted on the envelope, includes:

1. who is laying the charge

2. what the charge is

3. name, address, age of accused

4. witnesses, their addresses, telephone numbers; and

5. witnesses' vacation schedules.

It takes only several minutes for the P.O. to fill in the sections of the form, and being given some of the vital information, such as the dates to be avoided (holiday schedules, etc.) makes the job of the police and prosecutor much easier.

2. Other Documents

There are a number of other documents required for the proper administration of justice. These are:

i) Original Probation Order

All original probation orders are filed at the court retaining jurisdiction of the order, along with the original information which alleged the offence for which the individual was placed on probation.[1] This original probation order must be in court when the accused's trial comes up, and in most areas, it is the court's responsibility for ensuring this. In some areas, there has been some reluctance on behalf of court officials to ensure that the original probation order is in court for trial. In these areas, a practice has evolved whereby P.O.'s obtain from the court a certified copy of the probation order, which in lieu of the original, is acceptable in court. A P.O. should check with his local area manager to verify whether this coincides with their area practice.

ii) Notice Under Canada Evidence Act

The Canada Evidence Act requires that individuals charged with Failure to Comply must be notified that a certified copy of the probation order, as well as other relevant documents, will be produced at trial. This notice must be served on the accused at least seven days prior to his trial date. Practices dealing with the serving of such notices vary from area to area, and officers should find out:

- whether court "tradition" in their area bothers with C.E.A. notices.
- if they do, what format is used.
- who serves the notice.

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1 For a more detailed discussion around the topic of jurisdiction, see Section IX.

(a) Hints for Serving the Notice

1. Depending upon local practice, the police may agree to serve the notice at the same time they serve the summons or execute the warrant. In areas where this is agreed to, the Canada Evidence Act notice can be supplied to the police along with the other wilful failure documentation.

2. The P.O. may attempt to serve the notice himself, either at the probation office (should the client still be reporting), or at his home. Also, the P.O. may wish to appear in court on one of the court dates to serve the accused there (provided he shows up). A Court Liaison Officer or the police court officer may also be able to serve the accused before or after his court appearance.[1]

3. If the accused refuses to accept the notice and refuses to sign the officer's copy of the Canada Evidence Act, the P.O. should attempt to identify himself and to verbally explain the contents of the notice, and make a note of the time and place of the attempted service. According to the Legal Branch, proper service does not depend upon the defendant's agreeing to accept the notice. However, the server should be satisfied that the defendant is the proper person and that he is aware of who the server is and what he had to say. They also recommend leaving the defendant's copy of the notice at the place of service, whether he accepts it or not.

4. If the trial date arrives and the accused has not yet been served, the P.O. may wish to consult with the Crown about asking that the case be adjourned for at least seven days, so that the provisions of service may be complied with.

(b) Notice for Copies of Documents, or Originals Too?

It would appear that if the "originals" of the probation order and records are available then notice under the Canada Evidence Act is not required. However, Professor Grant advises that the arguments that can be raised about failure to give notice (under s. 28 Canada Evidence Act) are such that it would be wise to always give written notice whether one is dealing with originals or copies of the documents in question. In the absence of clear case law stating that notice does not apply to "originals", Professor Grant advises to provide notice in every case, if possible. The Director of the Legal Branch has also suggested that the notice be used with originals.

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1 For a description of the role of the Court Liaison Officers, See p. 47.

(c) Is it Possible to Serve an Accused's Lawyer?

In collecting ideas for the revisions for the guide, it was suggested that it may be possible to serve the Canada Evidence Act notice to an accused's lawyer, given the common difficulty of locating and serving the accused himself. The P.O. may indeed wish to serve the lawyer, and Murray Chitra, of Legal Branch suggests that although this is not ideal it may be better than no service at all. Professor Grant also tends to support the notion that notice under s. 28 of the Canada Evidence Act should be given to "the party against whom it is intended to be produced". There have been some cases where serving an accused's counsel with an analyst's certificate (Narcotic Control Act) has sufficed,[1] as well as an instance where the court upheld the service of a law student representing an accused.[2]

However, as there are also cases which do not support the service of an accused's counsel,[3] it is therefore recommended that the safest route remains the one which suggests giving the notice to "the party against whom it is intended".

iii) Cautioning the Probationer re: ss. 664 and 666

The Code, in section 663(4) provides that whenever a probation order is made, the court shall cause the order to be read by or to the accused, and cause a copy of the order to be given to the accused. It also stipulates that the accused must be informed of the legal consequences of further convictions or violations while on probation. In the past several years there has been some legal debate as to whether this caution must be administered by the judge, or whether it can be delegated to other officials. As a consequence of an earlier decision in Palermo, which argued that it must be the judge himself who administers the caution, it became standard practice for courts to dismiss charges of wilful non-compliance where the defence had shown that the caution was not administered properly. While the caution must still be administered in its entirety (see R. v. Bara), recent (1982) appeal decisions (R. v. Sterner and R. v. McNamara) have found that the caution is administrative in nature, and may be delegated to court officials, including probation officer. The Court in McNamara added that the signature of the probationer on the probation order that he or she was informed of the provisions of sections 664 and 666 constitutes an admission that the statutory requirements of s.663(4) have been complied with.

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1 R.v Flett (1970) 73 WWR (BCCA)
R.v Zinek (1971) 4 CCC (2d) 129 (Alta CA)

2 R.v Meyer (1973) 29 CCC (2d) 165 (BCCA)

3 R.v Cackette (1976) WWD 118 (B.C. Prov. Ct.)

3. Documentation Procedures in Toronto

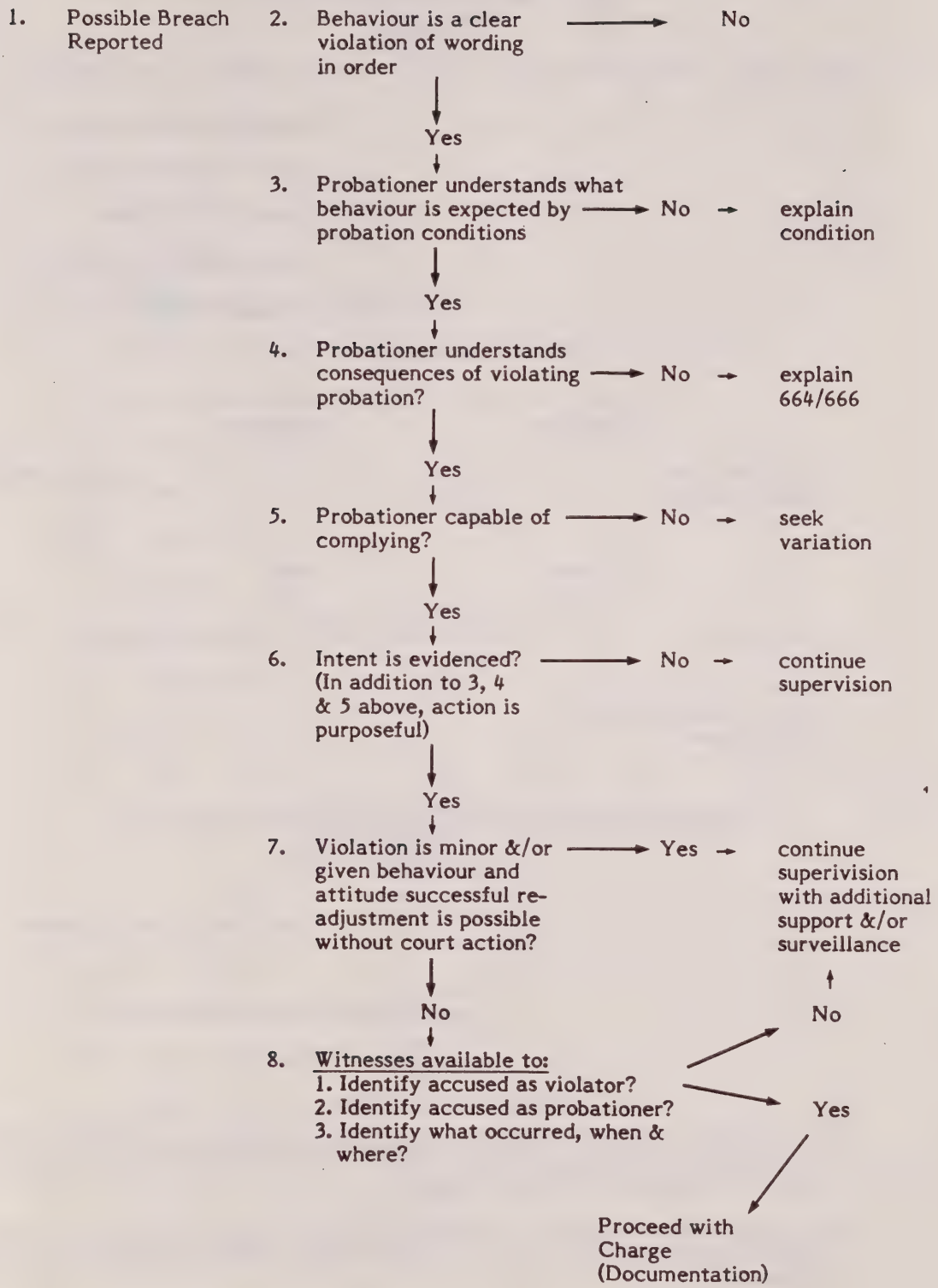
While the exact form and content of documentation will vary from court to court, special mention of Toronto area procedures are merited, given the large number of P.O.'s who work in the judicial district covering Metropolitan Toronto.

In Toronto, as elsewhere, the supervising probation officer is responsible for initiating breach proceedings. In some cases, where an office operates on a team system, this may mean referring the matter to the team for a decision, or referring the case to an enforcement officer for supervision or breach action. Once a decision is made to proceed, the documentation is prepared by the responsible officer who forwards the "package" to the Probation Court Liaison Officer. Each court in Toronto is served by a Court Liaison Officer (C.L.O.) who once having verified that the documentation is in order, swears the information on behalf of the supervising P.O., and then subsequently monitors the charge through the court system.

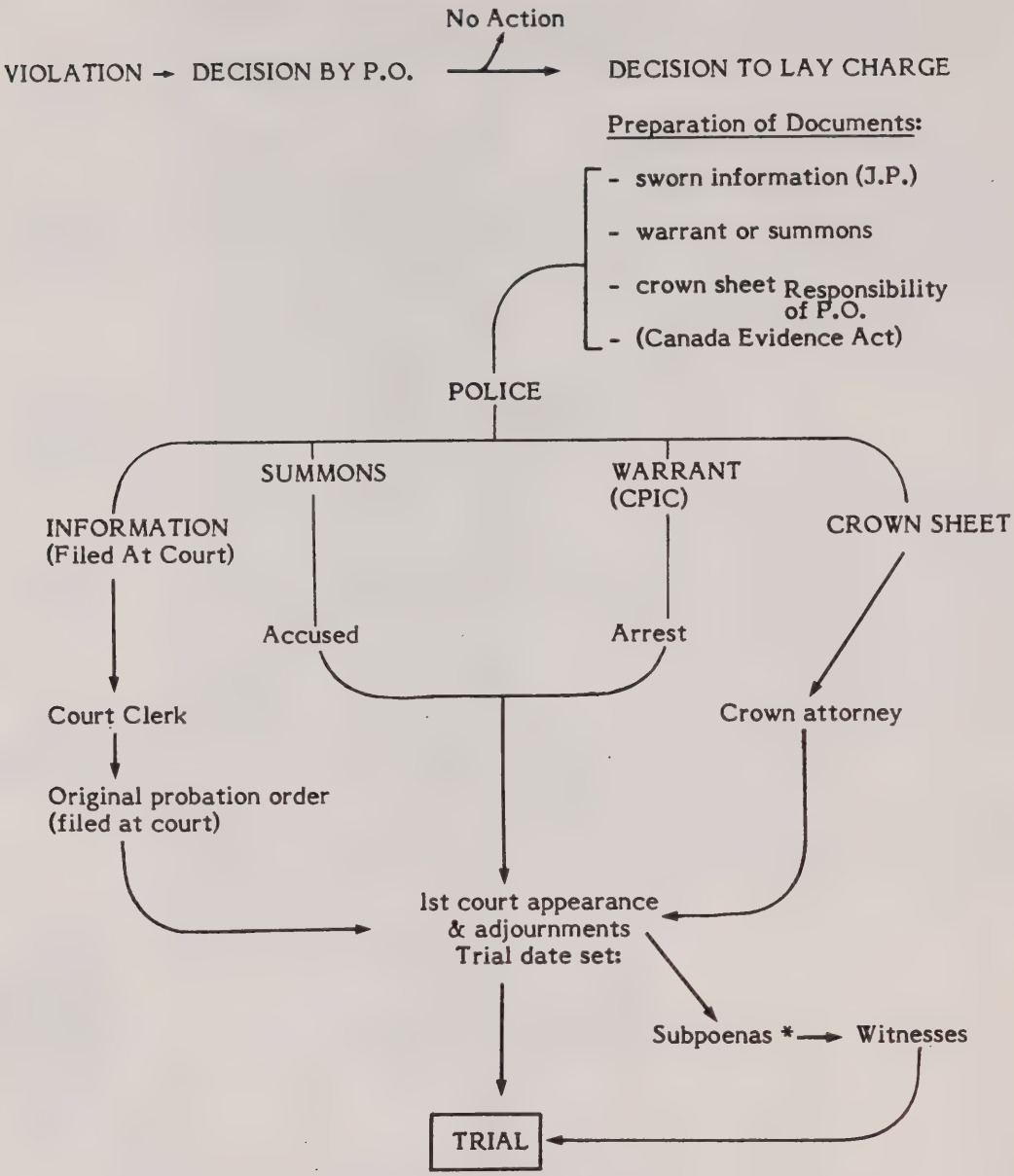
Essentially, the documentation for Toronto cases is similar to that required elsewhere. An information must be completed, summons or warrant issued, Canada Evidence Act notice prepared, and original court documents (or their certified copies) secured. However, in Toronto, information for the Crown brief is recorded on the same form that is used by the Metropolitan Toronto Police. In the case of a charge where a summons is requested, the evidence of the breach is recorded on form MTP 202. Where a Warrant is necessary, form MTP 209 is completed. Rather than recording a comprehensive accounting of the evidence on these forms, it is only necessary to provide a synopsis of the charge, sufficient only to provide enough information for a guilty plea. If more space is required, form MTP 232 can be used.

In Toronto, the Canada Evidence Act notice has been adapted for use in Probation matters. A sample of this notice, as well as other documents used as a package in Toronto enforcement matters are to be found in Section VI (Sample Documents).

(B) **Wilful Failure Checklist**



(C) **Wilful Non-Compliance - Paper Flow**



*In some areas, the police subpoena all witnesses, including the probation officer. In areas where this practice is followed, it is a good idea to advise the police of the names and addresses of all the witnesses.

**In Toronto the Information is separated by CLO and remains at Court. All other documentation remains with the police. These are combined at 1st Court appearance.

SECTION VI

SAMPLE DOCUMENTS (section 666)

pages 51 - 62

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1. Information
2. Information
3. Information - reverse side
4. Information (as part of snap-set information & summons)
5. Summons portion of snap-set
6. Warrant
7. Crown brief
8. Crown brief
9. Subpoena
10. Notice under Canada Evidence Act
11. Crown envelope

SAMPLE DOCUMENT "PACKAGE" FOR TORONTO COURTS

pages 63 - 70

1. Information
2. Crown Brief (Police Form 202)
3. Crown Brief (Police Form 209)
4. Supplementary Report (Police Form 232)
5. Notice under Canada Evidence Act
6. Request for certified documents
7. Crown Envelope ("Dope Sheet")

SAMPLE DOCUMENTS

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF YORK

INFORMATION of FRED PARKER

of 5262 Bailey Road, Toronto

Probation&Parole Officer (occupation). The informant says

that he has reasonable and probable grounds to believe and does believe

that John Doe
in the period from June 15, 1979 to July 3, 1979
at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did while bound by a Probation Order made on June 1, 1979 by His Honour Judge W.F. Smedley in the Provincial Court (Criminal Division), Oshawa, wilfully fail or refuse to comply with such order to wit: by failing to report as required to a Probation Officer, contrary to section 666 of the Criminal Code of Canada.

SPECIMEN

Sworn before me at the Municipality of Metropolitan Toronto in the Judicial District of York this 1st day of Aug 19 79

J.P.'s signature
A Justice of the Peace in and for the Province of Ontario

Fred Parker.
Informant

Appearance Notice ☐ Promise to Appear ☐ Recognizance For 19 Confirmed on 19 J.P.

Date

Crown Elects to Proceed ☐ Summarily ☐ By Indictment ☐ Summary Conviction Offence (s)

Accused Elects Trial by ☐ Judge ☐ Judge and Jury

☐ Discharged ☐ Committed – ☐ Ordered to Stand Trial – ☐ With Consent of Accused and Prosecutor, Without Taking or Recording – ☐ Any Evidence (or) – ☐ Further Evidence. Bail $

☐ Accused Elects Trial by a Magistrate (Provincial Judge) ☐ Absolute Jurisdiction

Pleads ☐ Guilty ☐ Not Guilty ☐ Withdrawn

Found ☐ Guilty ☐ Not Guilty ☐ In Absentia

☐ Absolute Discharge ☐ Conditional Discharge

Fined $ & $ costs. Time to pay

or Date of Birth

Day	Mo.	Yr.

Probation for

Sentenced to
Imprisonment for

No. of Inf. .....

Return Date of Summons .....19.....

INFORMATION Against

JOHN DOE

Address

(last known address)
16 Birch Street

TORONTO, Ontario

CHARGE: **Wilful Non-Compliance with Probation sec. 666 C.C.C.**

☐ Summons ☒ Warrant ☐ Arrest

Informant **Fred Parker**

Date Sworn **August 1, 1979**

Officer No.

Div. **55** Dist.

☐ Motor Vehicle Offence (H.T.A. 150)

Sex	Birth Date			Was Defendant Owner?
	Day	Mo.	Year	
M	01	01	58	Yes ☐ No ☐

Driver's Licence No.

Vehicle Registration No.

Was there Personal Injury? Yes ☐ No ☐

Property Damage? Yes ☐ No ☐

Courtroom

At

Notice given under H.T.A. ☐ 153a Susp. ☐ 15

Date	Accused –Appears– Adjournment (Remand) to	Parties Consent	BAIL Cash..... Property..... and/or other Action	Fails to Appear	Bench Warrant	Discretion	Estreat	COSTS (Sum Con. only) Presiding Judge or J.P.	$	Constable	Witnesses	Travel. Exp.	J.P.	Counsel Fee (ONT. S.C.A.)	Interpreter	Sundry Items		TOTAL

Date	Clerk	Reporter	For Crown	For Accused

-52A-

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF YORK

INFORMATION of GEORGE HAMILTON

of 6523 Sunset Rd., Toronto, Ontario

Probation&Parole Officer (occupation). The informant s

that he has reasonable and probable grounds to believe and does believe

(1) that John Doe

In the period from April 7, 1977 to July 1, 1977

on or about the XX day of XXXX 19XX , at the Municipality

Metropolitan Toronto in the Judicial District of York, unlawfully did while bound by a Probation Order made by His Honour Judge W.F. Smedley in the Provincial Court (Criminal Division), Toronto, on May 1, 1977, wilfully fail to comply with such order, to wit: by failing to complete community work at the rate of not less than 10 hours per month, contrary to section 666 of the Criminal Code of Canada.

SPECIMEN

Sworn before me at the Municipality of Metropolitan Toronto in the Judicial

District of York this 2nd day of July 19 77

Justice of the Peace

A Justice of the Peace in and for the Province of Ontario

George Hamilton

Informant

Date	☐ Appearance Notice ☐ Promise to Appear ☐ Recognizance for 19 confirmed. J.P.

Crown Elects to Proceed ☐ Summarily ☐ By Indictment ☐ Summary Conviction Offence (s)

Accused Elects Trial by ☐ Judge ☐ Judge and Jury

☐ Discharged ☐ Committed – ☐ Ordered to Stand Trial – ☐ With Consent of Accused and Prosecutor,

Without Taking or Recording – ☐ Any Evidence (or) – ☐ Further Evidence. Bail $

☐ Accused Elects Trial by a Magistrate (Provincial Judge) ☐ Absolute Jurisdiction

Pleads ☐ Guilty ☐ Not Guilty ☐ Withdrawn

Found ☐ Guilty ☐ Not Guilty ☐ In Absentia

☐ Absolute Discharge ☐ Conditional Discharge

Fined $ & $ costs. Time to pay

or Date of Birth

Day	Mo.	Y

Probation for

Sentenced to

Imprisonment for

Provincial Judge

AG 177 - MT 628 (Short Form – Single Accsd. – Not More Than Two Charges) (11/75)

Date	Accused –Appears– Adjournment (Remand) to	Parties Consent	BAIL Cash.................... Property .... and/or other Action	Fails to Appear	Bench Warrant	Discretion	Estreat	Notice given under H.T.. ☐ 153a Susp. ☐ ?.?4(3) I	
								COSTS (Sum... only)	
								Presiding Judge or J.P.	$
								Constable	
								Witnesses	
								Travel. Exp.	
								J.P.	
								Counsel Fee (ONT. S.C.A.)	
								Interpreter	
								Sundry Items	
								TOTAL	

INFORMATION Against

...rn Date of Summons ....19.........

JOHN DOE
(last known address)
1234 Any Street,
TORONTO, Ontario
M2P 3L5

Address

CHARGE: **Wilful non-compliance with probation S.666,C.C.C.**

☐ Summons ☒ Warrant ☐ Arrest

Informant: George Hamilton

Date Sworn: July 2, 1977

Officer — No.

Div. — Dist.

☐ Motor Vehicle Offence (H.T.A. 150)

Sex	Birth Date			Was Defendant Owner?
M	03 Day	02 Mo.	48 Year	Yes ☐ No ☐

Driver's Licence No.

Vehicle Registration No.

Was there Personal Injury? Yes ☐ No ☐ — Property Damage? Yes ☐ No ☐

Courtroom: A1

Date	Clerk	Reporter	For Crown	For Accused

CANADA
PROVINCE OF ONTARIO
THE JUDICIAL DISTRICT OF YORK

INFORMATION of FRED PARKER
6523 Bailey Rd., Toronto, Ontario
Probation & Parole Officer (occupation), INFORMA

AGAINST Richard Crook
Address 1234 Any Street, Toronto, Ontario M2P 3L5

THE INFORMANT SAYS

that (s)he has reasonable and probable grounds to believe and does believe that RICHARD CROOK (accused)

on or about the 6th day of June 1979 at the Municipality of Metropolitan Toronto

in the Judicial District of York **unlawfully did while bound by a Probation Order made on January 2, 1979 by His Honour Judge N.R.Touchstone in the Provincial Court (Criminal Division), Toronto, wilfully fail or refuse to comply with said order, to wit: by failing to abstain totally from the use of non-medical drugs, contrary to s. 666 of the Criminal Code.**

SPECIMEN

Sworn before me at the Municipality of Metropolitan Toronto in the Judicial District of York this 18th day of June 1979

A Justice of the Peace in and for the Province of Ontario

Fred Parker
(informant's signature)

SUMMONS RETURNABLE on Mon. day the 23rd day of July at nine o'clock, in the fore noon. in the Provincial Courtroom #202, 80 The East Mall Etobicoke

ACCUSED TO APPEAR FOR PURPOSES OF IDENTIFICATION OF CRIMINALS ACT

on day the day of 19 at o'clock in the r

at

DATE

Crown Elects to Proceed ☐ Summarily ☐ By Indictment ☐ Summary Conviction Offence(s)

Accused Elects Trial by ☐ Judge ☐ Judge and Jury

☐ Discharged ☐ Committed – ☐ Ordered to Stand Trial – ☐ With Consent of Accused and Prosecutor,

Without Taking or Recording – ☐ Any Evidence (or) – ☐ Further Evidence. Bail $

☐ Accused Elects Trial by a Magistrate (Provincial Judge) ☐ Absolute Jurisdiction

Pleads ☐ Guilty ☐ Not Guilty ☐ Withdrawn

Found ☐ Guilty ☐ Not Guilty ☐ In Absentia

☐ Absolute Discharge ☐ Conditional Discharge

Fined $ & $ costs Time to pay

or Date of Birth

Day	Mo.	Yr.

Probation for

Sentenced to Imprisonment for

Provincial Judge

SNAPSET-INFORMATION AND SUMMONS UNDER THE CRIMINAL CODE OR OTHER FEDERAL STATUTE

CANADA
PROVINCE OF ONTARIO
THE JUDICIAL DISTRICT OF
YORK

SUMMONS TO ACCUSED

UNDER THE CRIMINAL CODE OR OTHER FEDERAL STATUTE

SPECIMEN

To

- Richard Crook
- 1234 Any Street,
- Toronto, Ontario
- M2P 3L5

WHEREAS YOU HAVE THIS DAY BEEN CHARGED before me that you

on or about the 6th day of June 1979 at the Municipality of Metropolitan Toronto

in the Judicial District of York **unlawfully did while bound by a Probation Order made on January 2, 1979 by His Honour Judge N.R.Touchstone in the Provincial Court (Criminal Division), Toronto, wilfully fail or refuse to comply with said order, to wit: by failing to abstain totally from the use of non-medical drugs, contrary to s. 666 of the Criminal Code.**

Dated at the Municipality of Metropolitan Toronto in the Judicial District of York this 18th day of June 1979

A Justice of the Peace in and for the Province of Ontario

THIS IS THEREFORE to command you in her Majesty's name
(1) TO ATTEND COURT on

Mon. day the 23rd day of July next

at nine o'clock, in the fore noon

in the Provincial Courtroom #202, 80 The East Mall

Etobicoke

before the Presiding Provincial Judge or any Justice for the said Judicial District who is there, and to attend thereafter as required by the Court in order to be dealt with according to law and

2. TO APPEAR on .... day the .... day of .... 19 .... at .... o'clock in the .... noon

at ....
for the purposes of the Identification of Criminals Act (Ignore if not filled in)

YOU ARE WARNED THAT FAILURE without lawful excuse to attend Court in accordance with this summons is an offence under subsection 133(4) of the *Criminal Code*. Subsection 133(4) of the *Criminal Code* states as follows: "Every one who is served with a summons and who fails, without lawful excuse, the proof of which lies upon him, to appear at a time and place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend Court in accordance therewith, is guilty of (a) an indictable offence and is liable to imprisonment for two years, or (b) an offence punishable on summary conviction." Section 455.6 of the *Criminal Code* states as follows: "Where an accused who is required by a summons to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act*, does not appear at that time and place, a justice may issue a warrant for the arrest of the accused for the offence with which he is charged."

(see "TO THE ACCUSED" *on reverse side)*

FORM [illegible]

WARRANT FOR ARREST

Form 7A

(1) NECESSARY IN PUBLIC INTEREST,
(2) ACCUSED FAILED TO ATTEND COURT IN ACCORDANCE WITH SUMMONS,
(3) ACCUSED FAILED TO ATTEND COURT IN ACCORDANCE WITH APPEARANCE NOTICE OR PROMISE TO APPEAR OR RECOGNIZANCE ENTERED INTO BEFORE AN OFFICER IN CHARGE OR
(4) ACCUSED EVADING SERVICE OF SUMMONS.

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF YORK

To the Peace Officers in the Municipality of Metropolitan Toronto and in the Judicial District of York and in the Province of Ontario:

WHEREAS JOHN DOE of the Municipality

of Metropolitan Toronto in the Judicial District

of York hereinafter called the accused, has been charged that he, on or about the

in the period from June 1, 1977 to July 1, 1977 day of XXX XX, at the Municipality of Metropolitan Toronto in the Judicial District of York, committed the offence of *(set out briefly the offence in respect of which the accused is charged):*

Wilful non-compliance with Probation
Contrary to Section 666 of the Criminal Code of Canada

SPECIMEN

AND WHEREAS *1 there are reasonable and probable grounds to believe that it is necessary in the public interest to issue this warrant for the arrest of the accused (455.3(4); 456.1(1));

*(*Strike out inapplicable paragraphs)*

*2 ~~the accused failed to attend court in accordance with the summons served upon him (456.1(2));~~

*3 an ~~appearance notice, promise to appear or recognizance entered into before an officer in charge was confirmed and the accused failed to attend court in accordance therewith (456.1(2));~~

*4 ~~it appears that summons cannot be served because the accused is evading service (456.1(2));~~

THIS IS, THEREFORE, to command you in Her Majesty's name forthwith to arrest the said accused and to bring him before the Presiding Judge of the Provincial Court (Criminal Division) of the said Judicial District of York or before me or any justice in and for the said Judicial District, to be dealt with according to law.

DATED at the Municipality of Metropolitan Toronto this ..... day of ..... 19.....

.....
Provincial Judge
(or) Justice of the Peace in and for the Province of Ontario

MT 598 E.P.L. (5 75)

FORM 25.1
(Section 453.1 and subsection 455.3(6))

WARRANT FOR ARREST

(1) NECESSARY IN PUBLIC INTEREST, (2) ACCUSED FAILED TO ATTEND COURT IN ACCORDANCE WITH SUMMONS, (3) ACCUSED FAILED TO ATTEND COURT IN ACCORDANCE WITH APPEARANCE NOTICE OR PROMISE TO APPEAR OR RECOGNIZANCE ENTERED INTO BEFORE AN OFFICER IN CHARGE OR (4) ACCUSED EVADING SERVICE OF SUMMONS.

John Doe

1234 Any Street,

Toronto, Ontario

M2P 3L5

(last known address)

Date Issued ..... 19.....

.....
(Informant)

.....
(Address)

.....
(Telephone No.)

ENDORSEMENT OF WARRANT

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF
YORK

Whereas this warrant is issued in respect of an offence mentioned in subsection 453(1) of the *Criminal Code*, I hereby authorize the release of the accused pursuant to Section 453.1 thereof.

DATED at the Municipality of Metropolitan Toronto

this..... day of..... 19.....

.....
Provincial Judge
(or) Justice of the Peace in and for the Province of Ontario

CONFIDENTIAL INSTRUCTIONS TO CROWN

Your Honour

re: **John Doe, wilful non-compliance with probation**

Fred Parker, Probation and Parole Officer will testify that:

On June 1st, 1979, John appeared before His Honour Judge W.F. Smedley in the Provincial Court, (Criminal Division), Oshawa, was convicted upon the charge of Break, Enter and Theft and on the said charge was adjudged: suspended sentence plus probation for 18 months.

Condition "B" of this probation requires the said John Doe to: "report to and be under the supervision of a Probation Officer as required."

On June 15th, 1979, a man identifying himself as John Doe, reported to the probation office. He confirmed that he was placed on parole on June 1st, and was correctly named in the Probation Order. The conditions of his probation were explained to him, as were the consequences of a possible violation. He was instructed to report again on July 3rd, 1979.

On July 3rd, 1979, he failed to report. Only July 5th, after no word was received from Mr. Doe, a letter was sent instructing him to report on July 15th.

However, he failed to report on July 15th, and on July 17th, he telephoned the probation office and explained he forgot to report. He was instructed to report on July 21st.

He failed to report on July 21st, and on July 22nd, a certified letter instructing him to report on July 30th, was sent to Mr. Doe care of his last indicated address on 21 Main St. South, Oshawa.

He again failed to report on July 30th, and in the period since then has made no contact whatsoever with the probation office.

Therefore, John Doe has wilfully failed or refused to comply with Condition "B" of his probation order, contrary to section 666 of the Criminal Code.

Date

Fred Parker
Probation & Parole Officer

NB: Some courts insist that the following statement be added to the first paragraph: (Submit Probation Order in Evidence).

CROWN BRIEF

RE: Wilful non-compliance
John Doe

1. GEORGE HAMILTON, PROBATION & PAROLE OFFICER, WILL TESTIFY THAT:

On January 1, 1977, John Doe appeared before His Honour Judge W.F. Smedley in the Provincial Court, (Criminal Division) Toronto, on a charge of Dangerous Driving. On the said charge of Dangerous Driving, His Honour Judge Smedley granted a conditional discharge plus probation for one year.

CONDITION "O" of this probation required the said John Doe to:

> "report to a Probation Officer as required and be under the supervision of a named Community Service Co-ordinator. To complete 100 hours of community work at the rate of not less than 10 hours per month. The work to begin within the first 30 days of the Probation Period at the discretion of the Community Service Co-ordinator."

2. PRISCILLA REEVE, COMMUNITY SERVICE CO-ORDINATOR WILL TESTIFY THAT:

John Doe was instructed to report to the Ontario Humane Society, 121 Dorval Avenue, Toronto, on April 3rd. From information received that John Doe only worked for one hour, out of a scheduled four hour period, he was given a schedule of work hours on April 4th, and was instructed to report for work on the following dates: April 7 and April 17. As a result of information received from Mr. Michael Conroy, Supervisor, Humane Society, that John Doe failed to report on April 7th and April 17th, a registered letter was sent to Mr. Doe on April 25th, instructing him to report to the Humane Society on May 4th. Mr. Doe telephoned the Probation Office on April 27th and indicated that he will report "without fail" on May 4th. When he failed to report on May 4th, a number of telephone messages were left for Mr. Doe to call the Probation Office, but he failed to do so.

3. MR. MICHAEL CONROY, SUPERVISOR, ONTARIO HUMANE SOCIETY WILL TESTIFY THAT:

John Doe reported only once on April 3rd, but worked only one hour out of a scheduled four hours, before leaving without giving a reason. Mr. Conroy will also testify that John Doe failed to report on April 7th, April 17th, and May 4th, and that since that date Mr. Doe has made no further contact with the agency.

Therefore, John Doe has wilfully failed or refused to comply with CONDITION "O" of his probation, contrary to section 666 of the Criminal Code.

Date

George Hamilton, P.P.O.

(Form 11)
(Section 627)

SUBPOENA TO A WITNESS

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF YORK

TO Mr. John Witness
of 2345 Brookline St. Toronto

SPECIMEN

WHEREAS Mr. John Doe (accused)
has been charged that he on or about the 4th day of May, 19 79
at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did

wilfully fail to comply with probation, contrary to section 666 of the Criminal Code of Canada

and it has been made to appear that you are likely to give material evidence for the prosecution or the defence.

THIS IS THEREFORE to command you to attend before the presiding Provincial Judge or Justice on Mon day, the 10th day of July next, at nine o'clock in the fore noon, in the Provincial Courtroom # 202
at 80 East Mall, Toronto
to give evidence concerning the said charge.

Dated at The Municipality of Metropolitan Toronto this ____ day of ____ 19 ____

A Justice of the Peace in and for the Province of Ontario.

MT 530

IN THE MATTER OF

REGINA

vs

John Doe

NOTICE GIVEN PURSUANT TO THE CANADA EVIDENCE ACT.

R.S.C. 1970, Chapter E-10.

TAKE NOTICE that the Crown intends to adduce into evidence at the Preliminary Inquiry and/or the trial of John Doe

pertaining to the offence(s) of Wilful Non-compliance with Probation, section 666, Criminal Code of Canada

certain copies of, and/or original books, records and documents, and without limiting the generality of the foregoing, including the following:

copy of probation order, dated June 1st, 1979
any other relevant documents

DATED AT THE MUNICIPALITY OF METROPOLITAN TORONTO this 6th day of August, 19 79.
enter date of service

Probation Officer
signature, rank and number of officer serving notice upon accused

SPECIMEN

signature of accused or counsel for accused

INSTRUCTIONS – Duplicate
Original - Give to the party against whom it is intended to be produced
Copy - Insert in Confidential Instructions Envelope

Ministry of the Attorney General

Supervisor's Initials and Date Checked

Confidential Instructions for Crown Counsel

DOE, DAVID JAMES
File Name *(No. 1 accused only)*

COURT 80 THE EAST MALL

ACCUSED	AGE	ADDRESS	IF PREV. RECORD CHECK WITH √	Criminal Record No.	RECORD ENCLOSED BY BADGE No.	PLEA	BAIL AMOUNT AND CONDITIONS	JUDGEMENT OR SENTENCE
1. DOE, DAVID JAMES		16 Birch Street TORONTO, Ontario.						
2.								
3.								
4.								
5.								
6.								

Proceed summarily - indictment – indicate with S or I
Copy(ies) of cautioned statement(s) enclosed

CHARGE(S)

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....

SPECIMEN

To be completed by Officer in Charge of case.

To be completed by Crown Attorney

Property involved in Charge (general description) .....

.....

.....

Photographs of victim YES ☐ NO ☐
Photographs of property/scene YES ☐ NO ☐

WARRANT ☐ PROV. OFF. TICKET ☐ ARREST ☐ APPEARANCE NOTICE ☐ SUMMONS ☐

Date of Offence ..... Date of Arrest .....

Occurrence Number .....

Officer i/c Case .....

Unit .....

Judge .....

Crown .....

1 Defense Counsel ..... Telephone No. .....

2 Defense Counsel ..... Telephone No. .....

3 Defense Counsel ..... Telephone No. .....

4 Defense Counsel ..... Telephone No. .....

5 Defense Counsel ..... Telephone No. .....

6 Defense Counsel .....

-62-

ENSURE THAT ALL RELEVANT DOCUMENTS ARE ENCLOSED TO ENABLE THE CROWN'S OFFICE TO DETERMINE IF A LESSER CHARGE SHOULD BE LAID AND/OR FULL DISCLOSURE CAN BE COMPLETED

COURT DATES	STATUS	REMARKS

WITNESSES

NAME (include status i.e. victim)	STATEMENT TAKEN Yes	STATEMENT TAKEN No	ADDRESS	POSTAL CODE	HOME TELE.	BUS. TELE.	VACATION(s)
S. Wickett Prob/Parole Officer			80 The East Mall, Rm 105 Toronto, Ontario			252-6521	June 6&7/83 June 27-July 1/33
Laura Zentner			2365 St. Clair Ave. W Toronto, Ontario.			767-3135	Aug. 19-24/83
Sandra Wong, Vol. Co-ordinator			North Western Gen'l. Hospital Toronto, Ontario.			651-6111	
Rochelle Fine			St. Michael's All Angels Day Care 611 St. Clair Ave. West, Toronto, Ontario.			653-1424	

TORONTO DOCUMENTS PACKAGE

CANADA
PROVINCE OF ONTARIO
THE JUDICIAL DISTRICT OF YORK

INFORMATION of (Miss) S. Wickett,
80 The East Mall, Toronto, Ontario
Probation & Parole Officer (occupation) INFORMANT

AGAINST David James DOE
Address 16 Birch Street,
Toronto, Ontario

THE INFORMANT SAYS

that (s)he has reasonable and probable grounds to believe and does believe that David James DOE (accused)
during the time period of January 24, 1983 to February 28, 1983
at ~~XXXXXXXXXXXXXX~~ ~~XXXXXXX~~ ~~XX~~ at ~~XXXXXXXXXXXXXXXXXX~~ Toronto

in the Judicial District of York unlawfully did, while bound by a probation order by by His Honour C.J.Cannon of Provincial Court (Criminal Division), Toronto, on November 23, 1982, wilfully fail to comply with such order, to wit, by failing to complete 25 hours of community service work at the rate of five hours per week, for five consecutive weeks.

Contrary to Section 666 of the Criminal Code of Canada.

SPECIMEN

S. Wickett
(informant's signature)

Sworn before me at the Municipality of Metropolitan Toronto in the Judicial District of York this 4th day of May 19 83

A Justice of the Peace in and for the Province of Ontario

SUMMONS RETURNABLE on Mon. day the 23rd day of May next at nine o'clock, in the fore noon in the Provincial Courtroom #205, 80 The East Mall Toronto

ACCUSED TO APPEAR FOR PURPOSES OF IDENTIFICATION OF CRIMINALS ACT

on ..... day the ..... day of ..... 19 ..... at ..... o'clock in the ..... noon

at .....

DATE

Crown Elects to Proceed ☐ Summarily ☐ By Indictment ☐ Summary Conviction Offence(s)

Accused Elects Trial by ☐ Judge ☐ Judge and Jury

☐ Discharged ☐ Committed – ☐ Ordered to Stand Trial – ☐ With Consent of Accused and Prosecutor,

Without Taking or Recording – ☐ Any Evidence (or) – ☐ Further Evidence. Bail $.....

☐ Accused Elects Trial by a Magistrate (Provincial Judge) ☐ Absolute Jurisdiction .....

Pleads ☐ Guilty ☐ Not Guilty ☐ Withdrawn

Found ☐ Guilty ☐ Not Guilty ☐ In Absentia

☐ Absolute Discharge ☐ Conditional Discharge

Fined $..... & $..... costs Time to pay.....

or ..... Date of Birth

Day	Mo.	Yr.

Probation for.....

Sentenced to Imprisonment for.....

Provincial Judge

FORM MT 701A (REV. 10/78) SNAPSET: INFORMATION AND SUMMONS UNDER THE CRIMINAL CODE OR OTHER FEDERAL STATUTE SINGLE ACCUSED NOT MORE THAN TWO CHARGES

No. of Inf. .....

Return Date of Summons Mon, May 23 19 83

INFORMATION Against

DAVID JAMES DOE

Address: 16 Birch Street,
Toronto, Ontario

CHARGE: **Wilful non-compliance with probation, s.666,C.C.C.**

☒ Summons	☐ Warrant	☐ Arrest
Informant (Miss) S. Wickett		
Date Sworn May 4, 1983		
Officer		No.
Div.	Dist.	
☐ Motor Vehicle Offence (H.T.A. 150)		
Sex: M	Birth Date: 05 Day / 07 Mo. / 63 Year	Was Defendant Owner? Yes ☐ No ☐
Driver's Licence No.		
Vehicle Registration No.		
Was there Personal Injury? Yes ☐ No ☐		Property Damage? Yes ☐ No ☐

Courtroom #205
[illegible]0 The East Mall, Toronto, Ont.

Date	Accused –Appears– Adjournment (Remand) to	BAIL Cash / Property and/or other Action	Parties Consent	Fails to Appear	Bench Warrant	Discretion	Estreat	Notice given under H.T.A. ☐153a Susp. ☐154(3) Impn	COSTS (Sum Con. only)	Presiding Judge or J.P. $	Constable	Witnesses	Travel. Exp.	J.P.	Counsel Fee (ONT. S.C.A.)	Interpreter	Sundry Items		TOTAL

SPECIMEN

Date	Clerk	Reporter	For Crown	For Accused

-64A-

COMP TS	C P I C	CODER	PROP CODER	INDEX	PAWN

RECORD OF

☐ Arrest ☐ Appearance Notice
☒ Summons Application ☐ Provi... Tick... Off

DEFENDANT'S PARTICULARS

SURNAME	GIVEN NAME(S)	ALIAS OR NICKNAME	MTP NO
DOE	DAVID JAMES		

SEX	AGE	DATE OF BIRTH	PLACE OF BIRTH	PROV	COLOUR	MARITAL STATUS	EYE COLOUR	HEIGHT	WEIGHT	HAIR COLOUR
M	19	15/07/63	TORONTO		WHITE ☒ YELLOW ☐ RED ☐ BLACK ☐ BROWN ☐	SINGLE	blue	1.7m	170	brow

PRESENT ADDRESS	POSTAL CODE	TELEPHONE NO	PREVIOUS ADDRESS
16 Birch Avenue, Toronto Ontario M9L 3C2		925-0000	14 Charleston St. Toronto, Ontar

ADDITIONAL INFORMATION/DESCRIPTION	FPS NO
Tattoo of "Shirley" with a heart on right forearm	

VEH PLATE NO	PROV	VEH YR/MAKE	DRIVER'S LIC NO (INDICATE PROV OF ISSUE)	SOCIAL INS NUMBER

EMPLOYED BY/SCHOOL ATTENDED	ADDRESS	OCCUPATION/GRADE	TELEPHONE NO
XXXXX Marklands High School	3 Princess Cres., Toronto	12	925-0001

SPOUSE ☐ GUARDIAN ☐ PARENT ☒ NEXT OF KIN ☐	NAME	ADDRESS	TELEPHONE NO
	Mrs. Jane Doe	14 Charleston Street, Toronto	325-4167

NOTIFIED BY	NAME, NO., UNIT	DATE & TIME	M I CARD ON FILE YES ☐ NO ☐	RECORDS BUREAU USE ONLY

WARRANT EXECUTED YES ☐ NO ☐	ARRESTING/ISSUING OFFICER(S) (SIGN IF WARRANT EXECUTED)	NUMBER(S)	UNIT(S)

LOCATION OF ARREST	DATE & TIME OF ARREST	CO-ACCUSED

SPECIMEN

OFFICER(S) PARADING PRISONER BEFORE O I C /STATION

MEDICAL NOTES (PHYSICAL CONDITION — INJURIES — MENTAL HISTORY AND SPECIFIC MEDICAL PROBLE OR MEDICATION TO BE TAKEN)

NAME(S) & NO(S) BADGE NO

COMPLAINT RECEIVED YES ☐ BY ☐ NO ☐
INJURY REPORT SUBMITTED YES ☐ BY ☐ NO ☐
FORCE REPORT SUBMITTED YES ☐ BY ☐ NO ☐

SGT I/C RECEIVING PRISONER - SIG & NO | DATE | TIME

INVESTIGATED BY	NUMBER(S)	UNIT(S)	INFORMATION OFFICER NO	DOPE SHEET OFFICER NO.	DOPE SHEET HELD AT

ARREST PARTICULARS

CHARGE(S) — INDICATE IF WARRANT — B W — W/C	DAY—DATE—TIME OF OFFENCE	LOCATION	PATROL AREA	OCCURRENCE NO
1. Fail to comply - Probation	June 6, 1979			
2. Original Investigating Officer - #5763 of 22 Division				

COMPLAINANT OR VICTIM	ADDRESS	SEX	AGE	OCCUPATION	TEL NO
1. Fred Parker	80 The East Mall	M		PPO	252-6521
2.					

CPIC CHECK OFFICER NO.	RECORDS BUR CHECK OFFICER NO / CLERK NO.	ARREST LINE/MAJOR OFFICER NO. / CLERK NO.	PREV CONVICT	ON PROBATION	PROB REPORT COMPLETED BY	ON BAIL	T.A.P./PAROLE	BAIL NO
			YES ☐ NO ☐	YES ☒ NO ☐		YES ☐ NO ☐	YES ☐ NO ☐	

DETAINED AT	TRANSPORTING OFFICER(S) NO(S)	DATE/TIME	BOOKING OFFICER(S) NO(S).	DATE/TIME BOOKED

CELL NO.

PRISONER'S PROPERTY TAKEN

PROPERTY RECEIPT NO. (IF HELD)

BAG NO.

AMOUNT OF CASH $

HELD ☐ NOT HELD ☐

PROPERTY RETURNED TO (PRISONER'S SIGNATURE)

I HAVE BEEN INFORMED THAT I MAY MAKE REASONABLE USE OF THE TELEPHONE

CALL NO DESIRED

NO(S). CALLED

DATE & TIME OF CALL

PRISONER'S SIGNATURE | SGT.'S NO & INITIAL

TRANS FOR PRINTS BY (NOS.)	DATE & TIMES TRANS. & RETURNED	PRINTED BY (NO.)

REPORT CHECKED BY O.I.C. OF STATION, SIG & NO

DETENTION/RELEASE PARTICULARS

PRISONER FED YES ☐ NO ☐ REFUSED ☐	1. DATE & TIME	RANK & NO.	2. DATE & TIME	RANK & NO.	3. DATE & TIME	RANK & NO

HOLD YES ☐ NO ☐ REASON	SHOW CAUSE YES ☐ NO ☒	BOOKING OFFICER(S) NO (S) — WHEN PRISONER RELEASED FROM CELL	INSP. RPT OFFICER NO	CALENDAR OFFICER NO

RELEASED YES ☐ NO ☐ BY SGT ☐ JP ☐ NAME	DATE & TIME RELEASED	COURT	DATE	A

P.O.T. NO ISSUED	OFFICER NO	MINOR TR. COURT DATE	INDICATE FORM OF RELEASE (E.G. 8.1, 8.2)	SIG & NO. OF OFFICER I/C AT THE TIME OF RELEASE

MTP 202
Rev. July '83

DISTRIBUTION: FORWARD TO RECORDS BUREAU

RETENTION: REFER TO SOURCE DOCUMENT

1

COMPTS	INIT & NO	CODE	PROP CODE	INDEX	PAWN

SUPPLEMENTARY RECORD OF

Arrest ☐ ☐ Appearance Notice
Summons Application ☒ ☐ Provincial Offences Ticket

NAME OF ACCUSED	CHARGE	
DOE, DAVID JAMES	wilful non-compliance with probation order of November 23/82.	
ARRESTING ISSUING OFFICER(S)	UNIT	INDICATE ORIGINAL ARREST DATE

Above as per original report

IF SYNOPSIS (GIVE SUFFICIENT DETAILS FOR A PLEA OF GUILTY. E.G. DATE TIME AND PLACE OF EACH OFFENCE - INDICATE CO ACCUSED NAME(S) - INJURIES SUSTAINED ETC

Summons issued on May 4, 1983, returnable May 23/83 at Court #205, 80 East Mall, Toronto, by J. P. Smith

On November 23, 1982, His Honour Judge C. J. Cannon at Provincial Court (Criminal Div.) 80 The East Mall, Toronto, convicted David James Doe of Theft Under suspended the passing of sentence and placed him on probation for one year. Condition (0) requires the probationer to partake in a Community Service Programme for a period of twenty-five (25) hours at the rate of five (5) hours per week for five (5) consecutive weeks, such programme to commence within 45 days of this order.

When the accused reported to the John Howard Society on January 6, 1983, a placement was found for him at the North Western General Hospital. In conjunction with the volunteer co-ordinator there, he arranged to do all the 25 hours in one week commencing January 24, 1983, prior to returning to school. He failed to appear at the placement on either January 24, 1983, or January 25, 1983, and the volunteer co-ordinator requested that another placement be found for him.

On January 25, 1983, a placement was arranged for him at St. Michael's Day Care Centre. He completed only four of the required 25 hours at this placement.

THIS REPORT PREPARED BY	RANK	NUMBER	UNIT
DATE & TIME OF THIS REPORT	STATION SERGEANT SIGNATURE		

SPECIMEN

232
Sept 80

DISTRIBUTION: FORWARD TO RECORDS BUREAU

RETENTION: REFER TO SOURCE DOCUMENT

1

COMPTS	INIT. & NO.	CODER	PROP. CODER	METROPOLITAN TORONTO POLICE SUPPLEMENTARY REPORT				OCCURRENCE NO.
CPIC		INDEX	PAWN	PREMISE CODE	OFFENCE CODE		WARR	SUMMONS STAMP / UNIT ASSIGNED: 22
			ADDED VALUE	WARRANT CODE	DATA ENTERED		WARRANT	OFFICER ASSIGNED

CONCERNING TYPE OF ORIGINAL REPORT	DATE AND TIME OF ORIGINAL REPORT	PLACE OF OCCURRENCE	PATROL AREA
Theft Under	November 23, 1982		

VICTIM (IF FIRM, NAME AND TYPE OF BUSINESS)	DATE AND TIME OF THIS REPORT

DATE WARRANT ISSUED D M Y | ISSUED BY: JUDGE — JUSTICE OF PEACE | ENDORSED: (CIRCLE) YES NO

ACCUSED: LAST NAME	GIVEN 1.	GIVEN 2.	ALIAS
DOE,	DAVID	JAMES	

ADDRESS: LAST KNOWN	PHONE	NEXT OF KIN	RELATIONSHIP	ADDRESS	PHONE
16 BIRCH ST. TORONTO	-----	Jane Doe	Mother	21 -3rd Street, Toronto	222-0000

EMPLOYER: LAST KNOWN	ADDRESS	PHONE	DRIVER'S LICENSE No.
unknown			

DESCRIPTION: SEX	COLOUR:		D.O.B.	EYE COLOUR	HEIGHT	WEIGHT	HAIR: COLOUR, STYLE	MARITAL STATUS
MALE	WHITE ☒ BLACK ☐	YELLOW ☐ RED ☐ BROWN ☐	D 05 M 07 Y 63	Blue	1.7m	170 lbs.	Brown	single

ADDED DESCRIPTIONS: GLASSES, SCARS, TATTOOS, AMPUTATIONS; ETC., F.P.S. No. M.T.P.F. No.

CHARGE: - SEC. 666 C.C. TO WIT: FAIL TO REPORT: PAY RESTITUTION ETC:

Wilful failure to comply with probation, to wit: by failing to complete 25 hours of community service.

SYNOPSIS EVIDENCE:

SEE ATTACHED SUPPLEMENTARY REPORT

ORIGINAL INVESTIGATING POLICE OFFICER	DIVISION	SUPPLEMENTARY INFO. ATTACHED (CIRCLE)
	22	"SHOW CAUSE" YES NO

PROBATION OFFICER: COMPLAINANT	ADDRESS	PHONE
Miss S. Wickett	80 East Mall, Toronto	252-6521

REPORT PREPARED BY	RANK	NUMBER	UNIT	CHECKED BY OFFICER IN CHARGE SIGNATURE .....

INSTRUCTIONS: This Report must be HAND-PRINTED, except signature, in BLACK INK, with a ballpoint pen, pressing firmly at all times. DESCRIPTIONS of persons and property to be as complete as possible.

UNIT & NO.	C.P.I.C.	DATA ENTRY	PREMISE CODE	OFFENCE CODE		WARRANT STAMP	UNIT ASSIGNED
DATE & TIME FORM RECEIVED AT R.B.			ADDED VALUE	WARRANT CODE		WARRANT	OFFICER ASSIGNED
CONCERNING TYPE OF ORIGINAL REPORT: THEFT UNDER			DATE OF ORIGINAL REPORT: November 23, 1982		PLACE OF OCCURRENCE: TORONTO		PATROL AREA / ZONE
VICTIM (IF FIRM, NAME & TYPE OF BUSINESS)							DATE OF THIS REPORT

On November 23, 1982, David James Doe appeared before His Honour Judge c. J. Cannon in the Provincial Court (Criminal Division), Toronto, on a charge of Theft Under. The passing of sentence was suspended and he was placed on probation for one year. Condition (0) of this order required him to "complete 25 hours of community service, at the rate of 5 hours per week, for 5 consecutive weeks, such program to commence within 45 days of this order." By April 1, 1983, only four (4) of the specified 25 hours were completed. (Reasons for using a warrant as opposed to a summons should be stated here).

REPORT P[illegible]ED BY	RANK	NUMBER	UNIT	CHEC[illegible] OFFICER IN CHARGE
SIGNATUR[illegible]				SIGNATU[illegible]

MTP-209
Rev. Sept.'83

IN THE MATTER OF

REGINA

vs

.....

NOTICE GIVEN PURSUANT TO THE CANADA EVIDENCE ACT

R.S.C. 1970, Chapter E-10

TAKE NOTICE that the Crown intends to adduce into evidence at the Preliminary Inquiry and/or the trial of .....
pertaining to the offence(s) of

WILFUL FAILURE TO COMPLY WITH PROBATION

SECTION 666 OF THE CRIMINAL CODE OF CANADA

certain records and/or documents, and without limiting the generality of the foregoing, including the following:

☐ A certified true copy of the original probation order dated _____ and made by _____;

☐ A certified true copy of the relevant information(s) or indictment(s) pertaining to the probation order;

☐ A certified true copy of the ledger pertaining to restitution payments accompanied by an affidavit;

☐ The original work schedule pertaining to the completion of community service work accompanied by an affidavit where required;

☐ _____

_____.

DATED AT _____ **this** _____ **day of**

_____ **19** ___

.....
(Signature of the accused)
ORIGINAL COPY RECEIVED BY ACCUSED

.....
(Signature of Probation Officer or Designate)

APPLICATION FOR

___ A CERTIFICATE OF CONVICTION

___ A CERTIFIED TRUE COPY OF PROBATION ORDER

___ A CERTIFIED TRUE COPY OF AN INFORMATION

OTHER _____

_____

Request received on _____ ___ In writing

___ By phone

___ In person

Location of the court Where the Case was Disposed of: _____

Courtroom Number: _____

NAME OF THE ACCUSED: _____

Alias: _____

CHARGE: _____

DATE OF DISPOSITION: _____

NAME OF JUDGE: _____

SENTENCE OR DISPOSITION: _____

REASON FOR REQUEST: _____

REQUESTED BY: _____

ADDRESS OF APPLICANT: _____

_____

TELEPHONE NUMBER: _____

TO BE: ___ MAILED or ___ PICKED UP

REMARKS: _____

Ministry of the Attorney General

Supervisor's Initials and Date Checked

Confidential Instructions for Crown Counsel

DOE, David James
File Name *(No. 1 accused only)*

COURT .....

ACCUSED	AGE	ADDRESS	IF PREV. RECORD CHECK WITH √	Criminal Record No.	RECORD ENCLOSED BY BADGE No.	PLEA	BAIL AMOUNT AND CONDITIONS	JUDGEMENT OR SENTENCE
1. DOE, David James		16 Birch Street, Toronto, Ontario						
2.								
3.								
4.								
5.								
6.								

Proceed summarily - indictment – indicate with S or I
Copy(ies) of cautioned statement(s) enclosed

CHARGE(S)

1. **Wilful Non-compliance with probation**
2. .....
3. .....
4. .....
5. .....
6. .....

To be completed by Officer in Charge of case.

To be completed by Crown Attorney

Property involved in Charge (general description) .....

.....

.....

Photographs of victim YES ☐ NO ☐
Photographs of property/scene YES ☐ NO ☐

WARRANT ☐ PROV. OFF. TICKET ☐ ARREST ☐ APPEARANCE NOTICE ☐ SUMMONS ☐

Date of Offence ..... Date of Arrest .....

Occurrence Number .....

Officer i/c Case .....

Unit **22 Division**

Judge .....

Crown .....

1 Defense Counsel ..... Telephone No. .....

2 Defense Counsel ..... Telephone No. .....

3 Defense Counsel ..... Telephone No. .....

4 Defense Counsel ..... Telephone No. .....

5 Defense Counsel ..... Telephone No. .....

6 Defense Counsel ..... Telephone No. .....

CA 017 (1/81)

Confidential Instructions for Crown Counsel

FILE NAME (Surname of No. 1 accused only) | COURT ROOM

ENSURE ALL RELEVANT DOCUMENTS ARE ENCLOSED TO ENABLE THE CROWN'S OFFICE TO DETERMINE IF A LESSER CHARGE CAN BE LAID AND TO ALLOW FULL DISCLOSURE.

COURT DATES AND TIMES	STATUS	REMARKS
Monday, May 23, 1983		SUMMONS
9:00 a.m. #205 Court		

SPECIMEN

WITNESSES

NAME & STATUS	Statement Enclosed	Notified For Trial	ADDRESS INCLUDING POSTAL CODE	HOME TELEPHONE	BUSINESS TELEPHONE	VACATION DATES
S. Wickett Prob/Parole Officer			80 The East Mall, Rm 105 Toronto, Ontario		252-0521	June 6 & 7 1983 June 27-July 1/83
Laura Zentner			2365 St. Clair Avenue West Toronto, Ontario		767-3135	August 19-24, L983
Sandra Wong Vol. Co-ordinator			North Western Cen'l Hospital Toronto, Ontario		651-6111	
Rochelle Fine			St. Michael's All Angels Day Care 611 St. Clair Avenue West Toronto, Ontario		653-1424	

DATE

SECTION VII

REVOCATION UNDER THE CRIMINAL CODE

(A) EXPLANATION

(B) DOCUMENTS

(C) PROCEDURES

- i) Court attendance
- ii) Reporting subsequent convictions
- iii) When does revocation apply?
- iv) Which court can revoke?
- v) How long after a subsequent conviction can revocation take place?

(D) REVOCATION - PAPER FLOW

(A) EXPLANATION

A probation order can be revoked whenever an individual, bound by a probation order made pursuant to a conditional discharge or suspended sentence, finds himself charged and convicted of a subsequent offence. A revocation basically comprises a hearing during which the court must satisfy itself that the person before it is the person who was originally placed on probation and that he or she was indeed involved in further offences while on probation. Having determined this, the court can, in the event of a probation granted under s. 663(1)a, impose any sentence that might have been imposed had not the passing of sentence not been suspended. If the probationer had originally been granted a discharge with probation, the court may, under the authority of s. 662(4), revoke the discharge, convict the probationer on the original charge, and impose any sentence that could have been imposed had the discharge not been granted initially.

Although revocation is not a trial per se, the principles of natural justice apply, so that due notice must be given, the accused must be given an opportunity to be heard, and items such as identity and fresh conviction which the accused is not willing to admit, must be strictly proven. Having due regard to these principles, the court can then revoke the original order and sentence the probationer on the original offence.

(B) DOCUMENTS

In order to satisfy the requirements of judicial procedure, a number of documents may be required at the revocation hearing:

Document	Purpose	Obtained From
i) Affidavit	outlines the nature of the original probation and the subsequent offences	prepared by P.O., Crown or Police
ii) Certificate of Conviction	outlines that probationer has been convicted of further offences	prepared by Court Clerks, obtained by P.O., Crown or Police
iii) Original Probation Order	to prove that probationer is on probation when subsequent offences and convictions occur, for revocation or variation in court.	court retaining jurisdictions
iv) Original Information	as evidence of being placed on probation	court retaining jurisdiction
v) Notice to Accused	To inform the accused of the intention to take revocation proceedings.	prepared by Crown, or Court Office

(C) PROCEDURES

i) Court Attendance

Some judges require probation officers to attend the hearing to identify the probationer, and if required, provide pre-sentence character evidence. However, the role of the P.O. within the revocation process appears to vary from area to area, and hence we refer the P.O. to his area manager in order to ascertain what the extent of his or her involvement should be.

ii) Reporting Subsequent Convictions to Crown

One practice which does appear to be universal, however, is that which requires probation officers to notify the local Crown attorney when a probationer has been charged and convicted of a new offence. The decision to apply for revocation is made by the Crown, although in most areas the Crown does rely on the recommendation made by the probation officer. Since Crown attorneys have huge court dockets, and do not become as familiar with the individual cases as the P.O., it is good practice to comment whether revocation would be in order, and the reasons either for or against. Probation officers are, after all, the experts at the community level and should not feel reluctant in providing input from their perspective. The probation officer has no authority to initiate revocation proceedings on his own, as the Criminal Code clearly states that the application for revocation lies within the range of the Crown's responsibilities. In cases where the client was placed on probation on an offence under federal prosecution, e.g. Narcotics Control Act, any further convictions while on probation should, in principle, be reported to the local federal Crown prosecutor and not the provincial Crown attorney.

iii) When Does Revocation Apply?

In order for revocation to take place, the probationer must have been charged and convicted[1] of a new offence while his probation is unexpired. If a person is charged with a new offence while on probation, but is not convicted until after his order has expired, the court cannot proceed with revocation. As well, a probation order cannot be revoked after it has terminated. Revocation is only available to revoke a suspension of sentence or to replace a conditional discharge. There is no revocation where a probation follows a jail sentence, or accompanies a fine, although in such instances the court can extend the order or make changes in the conditions of the order, as a result of a subsequent conviction. (See section II).

As an option, a charge of wilful non-compliance can be initiated if six months have not expired since the date of the subsequent offence.

A charge of wilful non-compliance can be considered a "subsequent offence", and the court can proceed with revocation, once a conviction is registered on the wilful non-compliance charge. (See section on Revocation case law.)

iv) Which Court Can Revoke?

Section 665 (1) indicates that a court to which the order has been properly transferred can enforce it "as if that court had made the order". Also by s. 665 (2), if for any reason the original court cannot deal with the matter, any court with equivalent jurisdiction in the province may do so. The Court of Appeal in Graham (1975) 27 C.C.C. (2d) 475 (Ont. C.A.) ruled that in the event of proper transfer (s. 665 (1)) or of appropriate reasons given why the original court could not deal with the matter, (s. 665 (2)), then a court of equivalent jurisdiction could revoke the order.

Until other courts interpret s. 665 (1) and (2) in light of the Graham decision, some difference of opinion amongst different provincial court judges is to be expected.

v) How Long After a Subsequent Conviction Can Revocation Take Place?

A court cannot revoke an order until the time allowed for an appeal on the subsequent conviction has elapsed, or the probationer has waived his right to such appeal (in writing).

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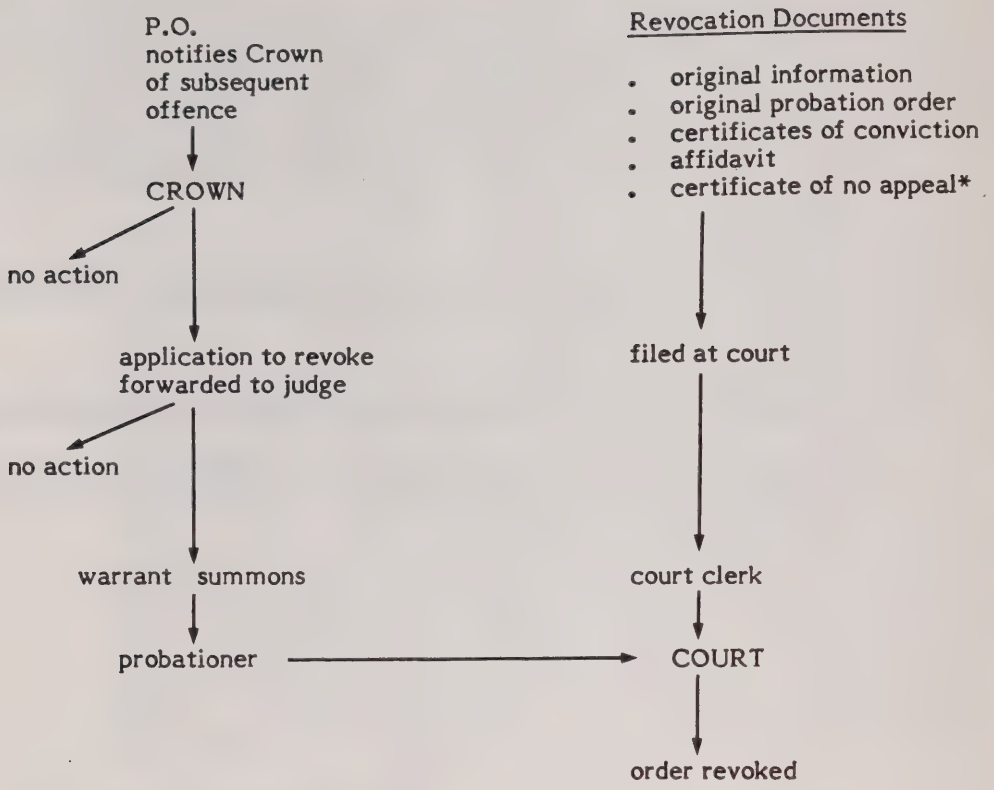
1 There has to be a conviction on the subsequent offence in order for revocation to apply. A conditional discharge on a fresh offence cannot lead to revocation proceedings.

(D) REVOCATION - PAPER FLOW



Samples of the various revocation documents are found in the section which follows.

*Some jurisdictions, notably Toronto require this document. Officers should inquire about their local practice with either the local court or Area Manager.

SECTION VIII

REVOCATION SAMPLE DOCUMENTS

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1. AFFIDAVIT
2. AFFIDAVIT
3. CROWN'S APPLICATION FOR REVOCATION
4. SUMMONS TO PROBATIONER (TO REVOKE CONDITIONAL DISCHARGE)
5. SUMMONS TO PROBATIONER (TO REVOKE A SUSPENDED SENTENCE)
6. WARRANT TO ARREST A PERSON BOUND BY A PROBATION ORDER
7. CERTIFICATE OF CONVICTION
8. CERTIFICATE OF CONVICTION

Sample Affidavit

Affidavit to Report subsequent offence by a person bound by a probation order made pursuant to section 663 (1) (a) of the Criminal Code of Canada.

CANADA	)	In the Matter of:
	)	
Province of Ontario	)	John Doe
	)	
Judicial District of York	)	DOB: Feb. 14, 1948

The affidavit of Carl Aspler, Probation and Parole Officer, 5233 Dundas St. West, Islington, Ontario in the Judicial District of York who under OATH SAITH that: John Doe of Toronto appeared before His Honour Judge J.S. Berger of the Provincial Court (Criminal Division) sitting in the Judicial District of York on June 21, 1976 when he was found guilty on a charge of Common Assault, contrary to the Criminal Code of Canada, for which the passing of sentence was suspended and the said John Doe was released under the terms of a two year Probation Order drawn on Form 44 of which the following was a condition:

That he keep the peace and be of good behaviour.

And that the said John Doe has failed to comply with the said condition in that on June 21, 1977 he appeared before His Honour Judge T. Climans of the Provincial Court (Criminal Division), sitting at Number 28 Court in the Judicial District of York, when he was found guilty and convicted of the offence of Robbery, having been committed on or about September 9, 1976.

For the said charge of Robbery, the said John Doe was sentenced to imprisonment for nine months.

Furthermore, no appeals have been taken against this subsequent conviction.

It is therefore stated that the said John Doe has failed to keep the terms of his Probation Order, and it is requested that he be returned to Court to be further dealt with according to law, and under section 664 (4) of the Criminal Code of Canada.

Taken and Sworn before me

A Justice of the Peace for

The Province of Ontario

At Toronto, this 15th day of August, 1977

_____

Carl Aspler
Probation & Parole Officer

_____

SAMPLE "2"

CANADA)
)
PROVINCE OF ONTARIO)
)
JUDICIAL DISTRICT OF YORK)

IN THE MATTER OF John Misdeed

THE AFFIDAVIT OF Bonnie L. Foster (Ms.), 1051 Pape Avenue, 2nd Floor, Toronto, Provincial Probation Officer, who under OATH SAITH, John Misdeed of 25 Third Avenue, Toronto, appeared before His Honour Judge M. Fosdick, Provincial Court (Criminal Division) sitting at College Park, Toronto, in the Judicial District of York, on January 23, 1980, when he was found guilty of the offence of Theft Under, contrary to the Criminal Code of Canada, for which offence he received a conditional discharge and the said John Misdeed was released conditionally under the term of a one year Probation Order drawn on Form 44 of which the following was a condition:

That he keep the peace and be of good behaviour.

AND THAT the said John Misdeed has failed to comply with the said condition in that on January 30, 1980, he appeared before His Honour Judge C.P. Snow in Provincial Court (Criminal Division) sitting at College Park, Toronto, in the Judicial District of York, when he was convicted of the offence of Theft Under, having been committed on or about March 6, 1980, and for which offence he was fined fifty dollars or ten days in common goal.

FURTHERMORE, no appeal has been taken against this subsequent conviction.

IT IS, therefore, stated John Misdeed has failed to keep the terms of his Probation Order and it is requested that he be returned to Court to be further dealt with according to law and under Section 664 (4) of the Criminal Code of Canada.

TAKEN AND SWORN before me,)
)
A Justice of the Peace for)
)
the Province of Ontario,)
)
at)
)
THIS day of)
)
1980.)

Bonnie L. Foster (Ms.)
Probation/Parole Officer

Application for Variation of a Probation Order

or for Sentencing of a Probationer

CANADA	)	IN THE MATTER OF
	)	
PROVINCE OF ONTARIO	)	JOHN DOE
	)	
JUDICIAL DISTRICT OF YORK	)	a Probationer

The Crown Attorney for the Judicial District of York, having perused the material hereto attached, hereby makes application to the Provincial Court, through his nominee, Carl Aspler, a Probation officer of the Provincial Probation Service, or the nominee of the said Probation Officer, to require before the said Court the appearance of John Doe, presently subject to a Probation Order, dated the 21st day of June, 1976, of the said Court.

This application is made pursuant to subsection (4) of section 664 of the Criminal Code, paragraph (a) of the said subsection being applicable.

M. A. Crossfield
Assistant Crown Attorney

SAMPLE "4"

SUMMONS TO A PERSON BOUND BY A PROBATION ORDER

(RE APPLICATION BY PROSECUTOR FOR REVOCATION OF ORDER AND IMPOSITION OF SENTENCE, OR VARIATION OF ORDER

CANADA
PROVINCE OF ONTARIO
COUNTY OF YORK
METROPOLITAN TORONTO

SPECIMEN

TO ..... **John Misdeed**

..... **29-3rd Avenue**

WHEREAS an application has been made to the Provincial Court (Criminal Division) of the said Municipality of Metropolitan Toronto and in the County of York by the prosecutor for the revocation of a probation order dated the ..... **23rd** ..... day of ..... **January** ..... 19 **80** ..... by which you are bound, and for the imposition of sentence upon you for the offence in respect of which the said probation order was made, or for an order varying the conditions of the said probation order, on the ground that you have since been convicted of an offence, namely,

THEFT UNDER $200.00

THIS IS THEREFORE TO COMMAND YOU, in Her Majesty's name, to appear before me or before the presiding Provincial Judge on ..... **Thurs.** ..... day, the ..... **8th** ..... day of ..... **May** ..... next, at ..... **10:00** ..... o'clock Toronto time in the ..... **fore** ..... noon in the Provincial Courtroom ..... **31** ..... at ..... **Old City Hall, Toronto** ..... or before any justice for the said County who is there, for the hearing of the above mentioned application and to be dealt with according to law.

Dated this ..... day of .....
19 ....., at the Municipality of Metropolitan Toronto

M Fosdick
Provincial Judge
M. Fosdick

(MT556EB)

(Form 6)
(Sections 441 and 700)

SUMMONS TO A PERSON CHARGED WITH AN OFFENCE

UNDER THE CRIMINAL CODE OR OTHER FEDERAL STATUTE

CANADA
PROVINCE OF ONTARIO
COUNTY OF YORK
METROPOLITAN TORONTO

TO JOHN DOE

25 3rd Avenue, Toronto, Ontario

WHEREAS you have been charged before me that you on or about the 18th day of August 19 76, at the Municipality of Metropolitan Toronto in the County of York, unlawfully did unlawfully did commit the offence of Common Assault, contrary to the Criminal Code. And on the 21st day of August, 1976 you pleaded guilty and were found guilty upon that charge and the Court adjudged that the passing of sentence be suspended upon the condition of "keeping the peace and being of good behaviour." And whereas you have failed to comply with said condition in that, on June 21, 1977, you were convicted of Common Assault, contrary to the Criminal Code. And whereas the Crown Attorney for the Judicial District of York had made application to require your appearance before the court pursuant to subsection 4(a) of Section 664 of the Criminal Code.

SPECIMEN

contrary to

THIS IS THEREFORE TO COMMAND YOU, in Her Majesty's name, to appear before the presiding Provincial Judge or before me on Friday day, the 14th day of October next, at 10:00 o'clock Toronto time in the fore noon in the Provincial Courtroom 202 at 80 The East Mall, Etobicoke, Ontario or before any justice for the said County who is there, to answer to the said charge, and to be dealt with according to law.

Dated this 5th day of September 19 76

at the Municipality of Metropolitan Toronto

Justice of the Peace in and for the Province of Ontario
C. R. Maughan (Provincial Judge)

MT556

-81-

SAMPLE "5"

SAMPLE "6"

WARRANT TO ARREST A PERSON BOUND BY A PROBATION ORDER

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF
YORK
METROPOLITAN TORONTO

.....

To the peace officers in the said Municipality

and in the Province of Ontario:

SPECIMEN

WHEREAS an application has been made to the Provincial Court (Criminal Division) of the said Municipality by the prosecutor requesting the Court to require the attendance before the Court of the accused

.....JOHN DOE, 25 3rd Avenue....., of the

.....Municipality..... of .....Metropolitan Toronto....., in the

.....Judicial District..... of .....York.....,

being a person bound by a probation order dated the .....21st..... day of.....June..... 19 ...76., in respect of an application by the prosecutor *to vary the terms (or) concerning an alleged breach* of the above mentioned probation order.

THIS IS, THEREFORE, to command you in Her Majesty's name forthwith to arrest the accused and to bring him before the Presiding Judge of the Provincial Court (Criminal Division) of the said Municipality or before me or any justice in and for the said Municipality, to be present for the hearing of the above mentioned application and to be dealt with according to law.

DATED this .....20th.....day of .....August.....19 77.,

at the ...Municipality.....of .....Metropolitan Toronto....

*(Strike out words not applicable)

J. S. Berger
..... *Provincial Judge*

(D508 WRD)

Judge J. S. Berger

SAMPLE "7"

(Form 31)
(Sections 500 and 741)

Conviction

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF
YORK

BE IT REMEMBERED that on the 21st day of June 19 76

at the Municipality of Metropolitan Toronto in the Judicial District of York,

JOHN DOE

hereinafter called the accused, was tried under *Part XVI (or) XXIV of the Criminal Code upon the charge that he, on or about the 9th day of April 19 76, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did **commit a common assault on Ernest Hemingway, CONTRARY TO SECTION 245(1) OF THE CRIMINAL CODE.**

and was convicted of the said offence, and the following punishment was imposed upon him, namely,

SUSPENDED SENTENCE, PROBATION 2 YEARS

Dated at The Municipality of Metropolitan Toronto, this 21st day of June 19 76

*(Strike out words not applicable)

Provincial Judge
J. S. Berger

MT559
AG 167

(Form 31)
(Sections 500 and 741)

Conviction

CANADA
PROVINCE OF ONTARIO
JUDICIAL DISTRICT OF
YORK

BE IT REMEMBERED that on the 21st day of June 19 76,

at the Municipality of Metropolitan Toronto in the Judicial District of York,

JOHN DOE

hereinafter called the accused, was tried under *Part XVI (or) XXIV of the Criminal Code upon the charge that he, on or about the 9th day of September 19 76, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did **steal the sum of two hundred and forty dollars, the property of Jane Murray**

CONTRARY TO THE CRIMINAL CODE

and was convicted of the said offence, and the following punishment was imposed upon him, namely,

IMPRISONMENT FOR NINE (9) MONTHS

Dated at The Municipality of Metropolitan Toronto, this 21st day of June 19 76

.....
Provincial Judge

*(Strike out words not applicable)

59
167

SECTION IX

HINTS AND SPECIAL TOPICS: Section 666

(A) DATING THE INFORMATION

i) Formats

ii) Determining the date of violation

(B) WORDING THE INFORMATION

(C) JURISDICTION

(D) UNSERVED SUMMONS

(E) WITHDRAWAL OF CHARGES

(F) PLEA BARGAINING - WITHDRAWAL OF P.O.'S CHARGE

(G) SEVERAL CHARGES ON ONE INFORMATION

(H) ENFORCEMENT OF ORDERS UNDER APPEAL

(I) ENFORCEMENT OF "NO-REPORTING" ORDERS

(A) DATING THE INFORMATION

i) A number of formats for dating are possible:

a) "On or about the _____ day of _____ 19__."

This format, the standard wording printed on all information forms, can be used when dealing with a violation which occurs more or less on a specific date. Failure to report, abstain from alcohol, or a failure to dissociate with co-accused are typical examples in which this wording may be appropriate.

b) "In the period from June 1st, 1977 to July 1st, 1978."

c) "During the period June 1, 1977 - July 1, 1978"

d) "In the thirteen (13) month period beginning on June 1st, 1977, and ending on or about July 1st, 1978."

Formats b, c and d are more readily adaptable for a violation which occurs over a period of time. Failure to pay restitution, failure to report, or failing to perform community service during a prescribed period of time, or according to a set schedule, are examples where this wording would be most appropriate.

It should be noted that the various formats presented here are suggested methods of dating the information. There is no one officially approved format, and this is reflected in the Appendix of Martin's Annual Criminal Code, where the various formats presented are suggested formats only. Martin's goes on to suggest that the Crown Attorney be consulted "in all cases where the facts are complicated". Needless to say, Probation Officers are encouraged to ascertain which formats are preferred in their own jurisdiction.

ii) Determining Date of Violation

Conditions which do not specify a schedule of work or payments (in the case of CSO or restitution) are enforceable only at the end of the period during which payments or work must be completed. An information arising from a failure to pay "X dollars by June 1st, 1979," uses June 1, 1979 as the date of violation. Similarly, in the case of a charge of wilful failure for not performing community work the date of violation is reached where it is impossible for the probationer to successfully complete the work. (e.g. A charge of failing to perform 100 hours of community work within a two year period ending on February 1st, 1983 cannot be laid until 100 hours prior to February 1st, 1983. (Assuming that none of the 100 hours was completed). However, particularly in the case of restitution or community service, we often find a minimum required schedule spelled out (i.e. at least six hours per month, or $50 payments monthly, etc.). In such cases, a charge of failure to comply can be initiated at a point where the probationer has become delinquent in keeping himself on schedule.

In the case of a person being returned to court on a section 666 for "Failing to Keep the Peace" because of his conviction of another offence while on probation, the date of the Section 666 violation corresponds to the date that the subsequent offence took place.

(B) WORDING

The wording on the information, as well as the summons or warrant should be clear and concise, yet detailed enough as to leave no doubt as to what the alleged breach is. Two sample wordings are suggested, although there are other formats which can be used.

Sample #1

"John Doe, in the period from _____ to _____ at the Municipality of _____ in the Judicial District of _____ unlawfully did, while bound by a Probation Order made by His Honour Judge P.F. Jones, in the Provincial Court (Criminal Division), Richmond Hill, on May 3rd, 1977 wilfully fail to comply with such order, to wit:
by failing to keep the peace and be of good behaviour in that he was convicted on January 15, 1978 by His Honour Judge C. Camblin of Theft Under having occurred on December 3, 1977 contrary to section 666 of the Criminal Code of Canada.

Sample #2

"John Doe, in the period from _____ to _____ at the municipality of _____ in the Judicial District of _____, unlawfully did, while bound by a probation order made by Judge P.F. Jones, in the Provincial Court (Criminal Division), Richmond Hill, on May 3rd, 1977, one of said conditions of said order being (1) that the said (name of accused) "report to a probation officer as required," wilfully fail to comply with said condition of such order, contrary to, Section 666 of the Criminal Code of Canada.

(C) JURISDICTION

Jurisdiction is defined as the "legal power by which a court is authorized to deal with a particular accused in respect to a particular offence".[1]

The court that made a probation order normally retains jurisdiction over that order unless it has been transferred to a court of equivalent jurisdiction in another area. The original probation order, as well as the original information (alleging the offence which led to probation) are both filed at the court retaining jurisdiction. In the process of transferring jurisdiction from one court to another court of similar jurisdiction (e.g. from a provincial court in one judicial district, to a provincial court located in a distant judicial district), the original information and probation order are sent to the court receiving the transfer of jurisdiction.

The issue of which court retains jurisdiction can sometimes interfere with probation enforcement. Although provincial court judges have province-wide jurisdiction and can undertake to process wilful failures wherever the breach

1 E. Ewaschuk, Criminal Pleadings and Practice in Canada, (Aurora: Canada Law Book Ltd., 1983) p. 3.

2 "One of the said conditions of said order being," can be replaced with the wording: "condition "B" of said order being....."

took place, or wherever the accused is found (s. 666 (2)), some Courts will often insist that they obtain jurisdiction of the probation order, if only to ensure that the original documents are on hand for the eventual trial. If a particular court is not overly insistent on holding jurisdiction of the order in a wilful failure proceedings, the P.O. should be aware that a certified copy of the original order must somehow be made available to the court in time for the trial. In some instances defence counsel representing probationers charged with wilful non-compliance have challenged the authority of a court to issue certified copies of a probation order, where the order was originally transferred from another jurisdiction pursuant to s. 665 (1) of the Code. In a recent (1983) unreported appeal case (R. v. Rombis) the Ontario Court of Appeal ruled that a court to which an order has been transferred clearly has the power to certify a copy of such an order.

(D) UNSERVED SUMMONS

When a summons is prepared, the return date indicated (the date the accused is summoned to appear in court) should allow the police sufficient time to find the accused and serve him with the summons. Postdating the return date by three or four weeks is usually sufficient. Occasionally, however, the police are unable to serve the summons by the time the return date rolls around, and the matter is marked on the court dispostion list as "no service". When this occurs, the summons is returned to the J.P. who signed it, who then extends this with a new court date, and further attempts are made to serve it. In instances where it is apparent that the accused has absconded or is evading service of the summons, the police have the power to replace the summons with a warrant. Queries regarding local procedures in this area should be directed to the police force handling the case, or the local court administrator.

(E) WITHDRAWAL OF CHARGES

Many P.O.'s are under the impression that they can withdraw a charge of wilful failure against a delinquent probationer should they so wish. It should be pointed out that once a charge is laid, it is the Crown's prerogative to have a charge withdrawn and the indication for a withdrawal must be made by the Crown in open court.[1] For what ever reason a P.O. may wish to have a charge withdrawn, it would probably be considered to be good legal practice to make such a request to the Crown attorney, explaining the reasons for the request.

(F) PLEA BARGAINING - WITHDRAWAL OF P.O.'S CHARGE

The process of plea bargaining can, in the larger and busier courts, sometimes result in a P.O.'s charge being withdrawn without his knowledge or approval. In some areas, it is an acceptable practice to submit a record of probation supervision with the Crown evidence so that the Crown can more accurately assess the situation before dropping a wilful non-compliance charge as part of a plea bargain. Whether such a method is used in your area or not, the P.O. should be aware of the process of plea bargaining. It may be helpful to note that, according to an authority on the subject (B. Grosman: "The Prosecutor" (1969), University of Toronto Press), the extent to which a Crown consults

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1 On the question of who has discretion to permit withdrawal of a charge, it appears that prior to arraignment discretion lies with the Crown. After arraignment and plea, the court has discretion to allow the Crown's request or to refuse it.

with interested parties in making his decision depends, not on legal precedent, but on the relative experience of the parties and their general relationship. Certainly one of the potent factors in the general relationship is that of mutual respect. So long as P.O.'s prepare their cases carefully, and pursue their charges with interest, the possibility of losing cases through plea bargaining should be minimized.

(G) SEVERAL CHARGES ON ONE INFORMATION

It is important to keep in mind that if there are breaches of several conditions for which charges must be laid, that care be taken to draft the information such that each breach is separated from each other and are outlined as separate counts in the information.

For example, the proper wording on an information for a probationer who has failed to pay restitution and failed to report, could be as follows:

In Metro Toronto there is a multiple Information Form which must be used when laying more than two charges on one information. It may be that other jurisdictions also use this. Officers should check with their Area Manager, C.L.O. or local court for current local practice.

(H) ENFORCEMENT OF ORDERS UNDER APPEAL

The probation officer is occasionally faced with the question of whether or not to supervise and enforce an order which has been appealed. There are some practical problems which develop when one decides to lay a s. 666 charge, just as there are problems which stem from a policy of non-enforcement. For example, if one decides to enforce an order, and the Court of Appeal eventually strikes down the original order, then one may end up with a conviction for a wilful failure when, in the final analysis, there is no probation order in the accused's record.

Legal Branch, in following the provisions of the Code and the corresponding case law, takes the position that despite the appeal, the order remains in effect unless:

1. there is a variation in the order (e.g. deleting reporting)
2. there has been a successful appeal
3. the appellate court has overturned the conviction and/or sentence
4. there has been a stay of the Probation Order by the appellate court pending appeal
5. where a trial de novo has been ordered by the appeal court on a summons conviction offence.

Professor Grant suggests that the decision to lay a charge should be based on an examination of the costs in time and effort being expended and the results likely to be achieved. This appears to be consistent with the ministry's policy which states that the P.O. must consult with the Crown attorney's office before enforcing an order under appeal. Presumably such consultation would involve a weighing of the relative pros and cons of enforcement in each particular case.

(I) ENFORCEMENT OF NO-REPORTING ORDERS

It is generally accepted ministry thinking that unless a person is specifically directed to be under the supervision of a probation officer, there is no means by which a probation officer can effectively monitor violations. Violations committed by probationers unknown to the ministry appear generally to be handled by the police.

However the question has arisen as to whether a P.O., in supervising a probationer on a reporting order, should enforce the non-compliance with a condition of a second non-reporting order. According to Legal Branch a probation officer is an officer of the court and has responsibility to ensure that respect is shown to the court. The opinion of the Branch is that common sense should prevail, and that the P.O., once seized of the information that an offence has taken place, can relay this information to the police, or deal with the matter himself. In addition, Professor Grant feels that anyone who has reasonable and probable grounds to believe that an offence has been committed, can lay an information, and that it is immaterial that the P.O. obtained the information while carrying out supervision on a different order.

SECTION X

ENFORCEMENT UNDER THE PROVINCIAL OFFENCES ACT

(A) THE LAW

1. purpose of the Act
2. eligibility for probation
3. conditions of probation
4. dates and duration
5. variations
6. breach of probation

(B) PROBATION ENFORCEMENT PROCEDURES

1. the nature of evidence
2. the documents
3. general comments

ENFORCEMENT OF PROVINCIAL OFFENCES

(A) THE LAW

1. Purpose of the Provincial Offences Act

The new Provincial Offences Act has been introduced to replace the summary conviction procedure for the prosecution of provincial offences with a new procedure that reflects the distinction between provincial offences and criminal offences.

2. Eligibility for Probation

Eligibility for the granting of probation under the Provincial Offences Act is found in section 72-(1) of the Act:

> 72-(1) Where a defendant is convicted of an offence proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission . . . . . .

The sentencing options which follow are similar to those set out for Criminal Code offences, namely;

(a) suspended sentence plus probation

(b) fine or imprisonment plus probation

(c) intermittent sentence of not more than 90 days, plus probation

Note that probation under this act can only be granted in respect to a conviction on a provincial offence, in a proceeding which was commenced by means of a sworn information. (Probation cannot be granted in those proceedings which were inititated by means of a certificate of offence, which represents a new means of commencing proceedings under the new Act). There is also no provision for a conditional discharge with probation.

3. Conditions

There are both mandatory and operational conditions which may be attached to a probation order.

The mandatory conditions are:

S. 72(2) (a) Not committing the same or any related or similar offence or any offence under a statute of Canada or Ontario's or any other province of Canada that is punishable by imprisonment.

(b) Appearing before the court as required.

(c) Notifying the court of any change of address.

The optional conditions are:

S.72 (3) (a) Satisfying compensation or restitution.

(b) Community service order (with consent of the defendant and where conviction is punishable by imprisonment).

(c) Such other conditions relating to the circumstances of the offence or the defendant to prevent similar unlawful conduct or contribute to rehabilitation (where conviction is punishable by imprisonment).

(d) Reporting to a responsible person designated by the court and where circumstances warrant it, being under that person's supervision.[1]

Once a probation order has been made, the Court is required to cause a copy of the order, and the section dealing with breach of probation (section 75) to be given to the defendant. It appears as though the word "cause" implies that the judge or justice does not have to personally perform this function.

4. **Dates & Duration**

A probation order comes into force on the date it is made, except in instances where ordinary imprisonment is ordered (s. 72 (1)(b)), in which case it takes effect when the sentence expires.

A probation order made under this act cannot remain in effect for more than 2 years. (s. 72(4))

5. **Variations** (s. 74)

The prosecutor or defendant may apply for a variation to an order. Notice of such an application must be made to the other party, and the variations can involve:

(a) Any changes or additions to the conditions that are rendered desirable by a change in circumstances

(b) A relief, either temporary or permanent, from any of the optional conditions

(c) A termination of the order, or a reduction in the period of the order.

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1 Note that the Act does not expressly refer to a probation officer as performing the reporting or supervision functions.

6. **Breach of Probation**

Section 75 of the Act describes the circumstances wherein a breach of probation can occur, and outlines the possible legal consequences which can follow. Basically a breach of probation occurs when:

(1) a person commits a further offence, which violates the mandatory condition that

> "the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada, or any other province of Canada that is punishable by imprisonment"; (s. 72 (2)(a))

- or -

(2) where the person wilfully fails or refuses to comply with any other condition in the order.

Enforcement in either case is by laying a new information alleging the breach, provided that the appeal periods in the original matter have passed or been waived, or the appeal has been dismissed or abandoned.

Upon conviction of breach of probation, the court has a number of options:

(a) To fine the defendant not more than $1000 or order imprisonment for not more than 30 days or both

(b) Simply to continue the order for a term of not more than one year with necessary changes or additions to it

(c) To do both (a) and (b) above

(d) If the justice is the one who made the original order, do none of the above but simply revoke the order and pass any sentence which was suspended originally under s. 72 (1)(a).

(B) PROBATION ENFORCEMENT PROCEDURES

1. **Nature of Evidence**

The manner of proving a violation with respect to a specific violation of a probation condition follows very much the same process as with Criminal Code wilful failures. It will be necessary to have sufficient evidence in the form of testimony and other proof to show that the defendant purposely engaged in conduct which fell outside the conditions attached to the probation order. Whatever the basis of the breach, it will be necessary to identify the defendant as the person originally bound by the probation order that is alleged to have been breached.

In cases where the breach is based on the commission of a further offence, it will be necessary to prove this subsequent offence by arranging for a certificate of conviction to be available and to have evidence that the defendant is the person named in the certificate.

It should be noted that the rules of evidence pertaining to the trial of a breach of probation under the Provincial Offences Act are found in the Ontario Evidence Act, not the Canada Evidence Act. The Ontario Evidence Act applies to "all actions - whatsoever respecting which the legislature has jurisdiction" (Evidence Act s. 2). "Action" is defined by s. 1 (a) as including "a prosecution for an offence committed against a statute of Ontario". However an example of where the Provincial Offences Act expressly excludes the operation of the Evidence Act can be found in s. 47 (5) of the Provincial Offences Act which states:

> "Notwithstanding section 8 of the Evidence Act, the defendant is not a compellable witness for the prosecution."

2. Enforcement Procedures: The Documents

(a) Swearing the Information

Unless a Minister of the Crown chooses to designate a probation & parole officer as a "provincial offences officer" (s. 1(2)) it appears that all proceedings should be commenced by laying an information under s. 24 & s. 25 of the Act.

s. 24(1): Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice will receive the information.

A summons or warrant can then be issued. However, in order for a warrant to be issued, it must be shown (either through the informant's allegations or the evidence) that it is "necessary in the public interest to do so". However, s. 25 (1)(a)(iii) also stipulates that for a warrant to be issued, the arrest must be "authorized by statute". Whether a warrant can be issued therefore depends on what is meant by "authorized by statute." According to Professor Alan Grant, it may be that the general power of arrest found in the Act may not seem to be wide enough to allow for a warrant in respect of a breach of probation. It is therefore difficult to determine whether the legislation has provided a workable enforcement device in cases where the service of summonses will not be effective.

Examples of a prepared warrant and information are found in the following Section. Although the forms used are specific to offences under the Provincial Offences Act, the required "text" of these documents is comparable to those required in Criminal Code offences. The same basically holds true for the other documents required under Provincial Offences.

(b) Summons

The preparation and service of the summons are clearly outlined in s. 26 and 27 of the Act. As with Criminal Code offences, each offence shall be set out in a different count, and each count shall refer to a single transaction. The particulars of the offence "shall contain sufficient detail of the circumstances of the alleged offence, to give the defendant reasonable information with respect to the act of omission".

Service of a summons is the responsibility of a provincial offences officer,[1] who attempts to personally deliver the summons. If that person cannot be conveniently found, then it may be left at his last known residence with a resident who appears to be at least 16 years old. Subpoenas are handled in the same manner.

(c) Notice for Introducing Evidence

Although an argument might be made that a probation order or certificate of conviction (see No. 4) is a public document under s. 30 and that no express notice requirement is necessary, it is probably safer to give at least seven days notice of intention to produce documentation. Basically it can do no harm, and may save the case if a judge should rule that the giving of such a notice is essential. To overcome arguments about effective service, the officer may wish to obtain the defendant's signature acknowledging that he has been served.

(d) Certificates of Conviction

Certificates of conviction are required in two instances. These include:

1. situations where a new offence is being used as evidence of wilful failure to comply with a specific condition,

- and -

2. where the order is being revoked (s. 75 (e))

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1 Policemen are considered to be provincial offences officers.

General Comments

Some of the main differences between the Criminal Code provisions and the Provincial Offences Act appear to be:

1. Notification of change of address becomes a mandatory condition under the Provincial Offences Act and the vague requirement of the Code to "keep the peace and be of good behaviour" disappears in favour of a prohibition on the commission of certain further offences.

2. No express reference to a probation officer per se appears in the Provincial Offences Act although, no doubt, a probation officer will qualify as a "responsible person".

3. The fine for breach of probation is greater but imprisonment less under the Provincial Offences Act compared to the Criminal Code where it is six months or $500 fine or both.

SECTION XI

SAMPLE DOCUMENTS: PROVINCIAL OFFENCES ACT

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1. PROBATION ORDER

2. INFORMATION (AS PART OF SUMMONS)

3. INFORMATION (REVERSE SIDE)

4. ARREST WARRANT

5. ONTARIO EVIDENCE ACT NOTICE (SAMPLE DRAFT)

PROVINCIAL
OFFENCES COURTS
PROVINCE OF ONTARIO
COURS DES INFRACTIONS PROVINCIALES
PROVINCE DE L'ONTARIO

PROBATION ORDER
ORDONNANCE DE PROBATION

Under Section 72 of the Provincial Offences Act
aux termes de l'article 72 de la Loi sur les infractions provinciales

Form 132
Formulaire numéro 132
Provincial Courts Act
Loi sur les Cours provinciales

Whereas/*Attendu que* ROBERT MALEFACTOR
hereinafter called the defendant/*ci-après appelé le défendeur*
was convicted of the offence of/*a été reconnu coupable d'avoir commis l'infraction*

contrary to/*par dérogation à* (NAME OF STATUTE FOR ACT) section/*article*
by the Provincial Offences Court of the/*devant la Cour des infractions provinciales du* Municipality

of/*de* Metropolitan Toronto
on the/*le* 8th day of/*jour de* January , 19 83
in a proceeding commenced by information/*à la suite d'une poursuite intentée par voie de dénonciation.*

And whereas on the/*Et attendu que le* 9th day of/*jour de* January , 19 83 , the court/*le tribunal*

(check applicable box/*cocher ce qui s'applique ici*)

☒ suspended the passing of sentence on the defendant and directed the defendant to comply with the conditions set out below.
a suspendu le prononcé de la peine imposée au défendeur et ordonné que celui-ci se conforme aux conditions énumérées ci-dessous.

☐ in addition to/*en plus de*
- ☐ fining the defendant/*lui imposer une amende,*
- ☐ sentencing the defendant to imprisonment/*le condamner à une peine d'emprisonnement,*

☐ directed that the defendant comply with the conditions set out below.
a ordonné que celui-ci se conforme aux conditions énumérées ci-dessous.

☐ imposed upon the defendant a sentence of imprisonment that did not exceed ninety days, ordered that the sentence be served intermittently and directed that the defendant comply with the conditions set out below at all times when he is not in confinement under that sentence.
a imposé au défendeur une peine d'emprisonnement d'une durée qui n'excède pas quatre-vingt-dix jours, a ordonné que la peine soit purgée de facon intermittente et a ordonné que le défendeur se conforme aux conditions ci-dessous pendant tout le temps qu'il n'est pas détenu aux termes de la condamnation prononcée contre lui.

Therefore, it is ordered that for the period of/*À ces causes, ordre est donné que pour la période de*
commencing *qui commence*

(check applicable box/*cocher ce qui s'applique ici*)

☐ from the date of this order/*à compter de la date de cette ordonnance,*

☐ from the date of the defendant's release from custody
à compter de la date à laquelle le défendeur a été remis en liberté,

SPECIMEN

CD 132-2 (rev. 06/83)

the defendant shall comply with the following conditions/*le défendeur se conforme aux conditions suivantes:*

1. The defendant shall not commit the same offence or any related or similar offence, or any offence under a statute of Canada or Ontario or any other Province of Canada that is punishable by imprisonment.
   Le défendeur ne doit pas commettre la même infraction, toute infraction connexe ou semblable ou toute infraction qui, aux termes d'une loi du Canada, de l'Ontario ou de toute autre province du Canada, est punissable d'une peine d'emprisonnement.

2. The defendant shall appear before the court as and when required.
   Le défendeur doit comparaître devant le tribunal de la façon et au moment ou il est enjoint de le faire.

3. The defendant shall notify the court of any change in his address.
   Le défendeur doit aviser le tribunal de tout changement d'adresse.

And, in addition, the defendant/*Et le défendeur doit de plus*
(set out and number additional conditions separately/*énoncer et numéroter les conditions supplémentaires séparément)*

SPECIMEN

Ordered at/*Ordonnance rendue à* TORONTO
this/*ce* 9th day of/*jour de* Janaury , 19 83.

Judge Smith

Provincial Judge or Justice of the Peace in and for the Province of Ontario and/or the County/District of
Juge de la Cour provinciale ou juge de paix pour la province de l'Ontario et/ou le comté/district de

I certify that the defendant was given a copy of this probation order
Je certifie qu'une copie de cette ordonnance de probation a été remise au défendeur
on the/*le* 9th day of/*jour de* January , 1983

☒ by personal service/*par voie de signification personnelle*

☐ by sending it to him by mail to/*par courrier à*

his last known address appearing on the records of the court
la dernière adresse du défendeur qui est donnée dans les archives du tribunal

1421 Rowen Road, Toronto

P. Ward.

Clerk/*Greffier*

SAMPLE "2"

INFORMATION

PROVINCIAL OFFENCES COURTS
PROVINCE OF ONTARIO

Under Section 24 of The Provincial Offences Act, 1979

Form 105
The Provincial Courts Act

This is the information of **Carl Aspler**
6523 Barley Road of **Toronto, Ontario**
Probation & Parole Officer (occupation) I have reasonable and probable grounds to believe and do believe

that,

(name) **ROBERT MALEFACTOR,**
1421 Rowen Rd.,
Toronto, Ontario

on or about the

14th day of **February**, **1983** at **Toronto** (location)
did commit the offence of **wilful failure to comply with the contion of a probation order, to wit: "pay restitution in the amount of $43.00 by February 14, 1983."**

contrary to **Provincial Offences Act**,
section **75**

C. Aspler
(Signature of Informant)

Sworn before me
at **Toronto**
this **20th** day of **February** 19 **83**

A provincial judge or justice of the peace in and for the Province of Ontario or the County/District of

SUMMONS RETURNABLE
AT **Old City Hall, Toronto**
ON THE **18th** DAY OF **March** 19 **83** AT **10:00** a.m. AT **21** (courtroom)

☐ Summons for ..... 19.... Confirmed on ..... 19.... .....
Justice of the Peace

Date

SPECIMEN

Pleads ☐ Guilty ☐ Not Guilty ☐ Withdrawn

Found ☐ Guilty ☐ Not Guilty ☐ In Absentia

☐ Sentence Suspended

Fined $..... & $..... costs. Time to pay .....

..... Date of Birth .....
Day Mo. Yr.

Probation for .....

Sentenced to Imprisonment for .....

CD 001 (2/80)

A provincial judge or justice of the peace in and for the Province of Ontario or the County/District of

No. of Information _____

Return Date of Summons March 18 19 83

INFORMATION Against

Address

Robert Malefactor
1421 Rowen Avenue
TORONTO, Ontario

CHARGE

Breach of Probation

S.75 Provincial Offences Act, 1979

☐ Summons ☐ Warrant ☐ Arrest

☐ Reportable Motor Vehicle Offence (H.T.A. 150)

Sex	Birth Date	Was defendant Owner ?
M	12 06 52	Yes ☐ No ☐

Driver's Licence Number

Vehicle Registration No. ☐ Involves an Accident

Courtroom

At

Accused Appears Adjournment | Parties Consent | BAIL and/or other action | Fails to appear | Bench Warrant | Certificate of Default

SPECIMEN

Justice' Initials | For Defendant | Prosecutor | Reporter | Clerk | Date

-102-

SAMPLE "4"

WARRANT FOR ARREST OF DEFENDANT

PROVINCIAL OFFENCES COURTS
PROVINCE OF ONTARIO

Under Section 25 of the Provincial Offences Act, 1979

Form 107
The Provincial Courts Act

To all police officers in the Province of Ontario:

This warrant is for the arrest of **ROBERT MALEFACTOR**

of **1421 Rowen Road, Toronto** (address) (occupation)

hereinafter called the defendant.

Whereas the defendant has been charged that he, on or about the day of **February**, 1983, at **Toronto**

did commit the offence of **wilful failure to comply with the condition of a probation order, to wit: "report to a probation officer when required."**

contrary to **The Provincial Offences Act** section **75**

And whereas,

(a) the arrest of the defendant is authorized by statute; and

(b) I am satisfied on reasonable and probable grounds that it is necessary in the public interest to issue this warrant for the arrest of the defendant.

Therefore, you are commanded in Her Majesty's name to arrest the defendant and to bring him forthwith before a justice to be dealt with according to law.

Issued at **TORONTO** this **20th** day of **Febraury**, 19 **83**

Provincial Judge or Justice of the Peace in and for the Province of Ontario and/or the County/District of

NOTE: Subsection 2 of section 28 of **The Provincial Offences Act, 1979** is as follows:

A warrant issued under section 25 remains in force until it is executed and need not be made returnable at any particular time.

CD107 (3/80)

Case Ref. No.

Address of Probation Office
Telephone No.
Date.

SPECIMEN

To: (Name Accused)
Address:

NOTICE OF PRODUCTION OF WRITING OR RECORD
(ONTARIO EVIDENCE ACT s. 36(3))

TAKE NOTICE THAT upon your trial at (Court) on (Date) for (Offence) IT IS INTENDED, on behalf of the Crown, TO PRODUCE in evidence the following documents, namely

1. Probation Order dated (show date) made in respect of (show name of probationer)

2. Certificate of Conviction dated (show date) in the name of (show name of person convicted)

(Signed)
Probation and Parole Officer

ACKNOWLEDGEMENT OF SERVICE

I, (name accused), hereby acknowledge receipt of the above notice.

(Signed): (Accused)

Date:

Witness: (Probation Officer)

SECTION XII

THE COURTROOM EXPERIENCE

(A) PREPARATION BEFORE GOING TO COURT

(B) COURTROOM LAYOUT

(C) COURTROOM DECORUM

1. Addressing the Court
2. Appearance
3. Oath or Affirmation

(D) PRESENTING ORAL EVIDENCE

1. Examination in Chief
2. Hints on presenting oral evidence
3. Responding to questions
4. Responding to attack
5. Hearsay
6. Use of Notes
7. Opinions regarding sentence

(E) CROSS EXAMINATION RESPONSE TECHNIQUES

THE COURTROOM EXPERIENCE

(A) HINTS BEFORE GOING TO COURT

a) Ensure that all documentation required for the case, such as certificates of conviction, probation order, etc. is available.

b) Ensure that casebook or other original notes of consultations with probationer, etc. are available for refreshing memory in giving evidence.

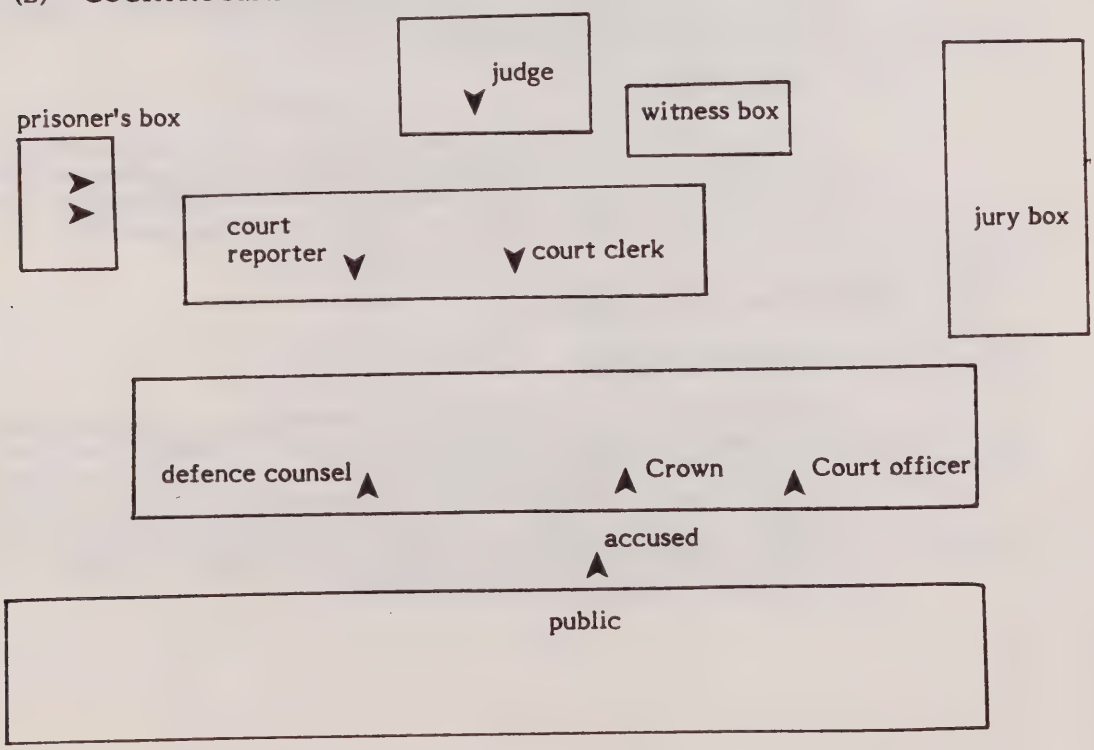
c) Read your material to refresh your memory regarding the case and review your facts. Anticipate what questions you may be asked.

d) Find out whether subpoenas were served, and review the case with each witness to ensure that they are aware of what evidence they will be presenting.

e) It may be beneficial to meet with the Crown prior to court to discuss the case and anticipate procedure for a "guilty" or "not guilty" plea. Advise the Crown on the case, refresh his memory and review the list of witnesses. Be prepared. Seeing the Crown beforehand shows that you are taking the case seriously.

f) If possible, gain some experience by going to court to observe the Crown and Defence in processing wilful failure charges.

(B) COURTROOM LAYOUT



The Courtroom

The courtroom has two major parts. The body where members of the public sit, and the front part for court personnel. Some may vary in physical layout, depending on the type of court (provincial, county or supreme).

There may be a special section for officers, or you may be required to sit in the first row of the public area. Uniformed police officers may be there to act as ushers, and advise people to take their place in court about 10 minutes before court starts.

When the judge enters, court is called to order. The clerk is in charge of all informations and exhibits and reads out the charges (the arraignments). The court officer is the police representative in court, and assists the Crown in his role of prosecutor. The police court officer is responsible for ensuring that the various police witnesses are in court, and that the relevant documents are available for the Crown.

(C) COURTROOM DECORUM

1. Addressing the Court

i) Judge: "Your Honour..."
ii) Crown and Defence: "Sir or Mr. (Ms.)..."

2. Appearance

Although some courts are more demanding than others when it comes to appearance and dress, it is important to note that casual or unkempt clothing diminishes respectability.

3. Oath or Affirmation

All witnesses are sworn in to "tell the truth, nothing but the truth....". Witnesses who have scruples about a religious oath, and object to taking it, should be aware that they have the option of "affirming" the truth. The fact that a witness affirms, in no way affects his credibility.

(D) PRESENTING ORAL EVIDENCE

1. Examination in Chief

During the examination in chief, the Crown will most likely ask specific questions to establish a number of facts. Although the line of questioning varies, and while one Crown asks a sequence of pointed specific questions, another may just stand there and ask the officer to explain the whole thing. Whether or not the Crown follows the "interrogation" technique or the "laissez-faire" mode, the witness has to establish a number of facts. These are:

(a)	Identifying himself	- explaining your name, and occupation
(b)	Identifying the defendant	- pointing him out in court
(c)	Introducing information about the Probation Orders	- outlining the original offence, the court, judge and date of the order
(d)	Explaining the condition which was violated	- reading the exact wording of the order.
(e)	Explaining the violation and establishing "wilfulness"	- chronologically tabulating what instructions were given to the probationer, what arrangements were made, what the probationer's responses were, and what efforts were made to attempt to get the probationer to comply.

2. <u>Hints on Presenting Oral Evidence</u>

(a) Speak clearly and slowly.

(b) Testify only to facts of your own knowledge.

(c) Tell the story in your own manner, using language that can be understood. Keep the sequence of events logical.

(d) Do not hurry your evidence. Take your time.

3. <u>Responding of Questions</u>

(a) Listen carefully to questions and make sure you understand them before replying. If you are not 100 per cent sure of what the question means, ask for clarification.

(b) Don't anticipate questions. Wait until the whole question is asked before replying.

(c) If the question is complicated, think out your answer first. It's better to reflect for a few moments than to start to open your mouth only "to change feet."

(d) Watch for misleading questions, which if answered too quickly, may confuse an issue or confuse you as a witness.

(e) Answer only what is asked of you. Don't offer information which is not asked, even though you think it is important. You are not there for "story telling time", but merely to give your evidence. Remember, every word is subject to cross-examination and rebuttal. Defence lawyers love "story tellers" as they will allow you to hang yourself by playing on conflicting statements, poor evidence and lack of credibility.

4. Responding To Attack

In order to discredit a Probation Officer's testimony some defence lawyers will cross-examine in a manner which demonstrates that the Probation Officer is biased against his client, or that the breach is a result of a "personality conflict" between the officer and his client. Sometimes questions will attempt to uncover that the officer acted rashly in laying the charge, or that reporting sessions were characterized by a hostility towards the probationer. This "ad hominem" approach is designed to increase the officer's level of anxiety and defensiveness. If the Probation Officer becomes angry or defensive while in the witness box, as a result of these questions, this may reinforce the defence lawyer's attempt to show that the officer in question does not have the objective capacity to supervise his client.

Officers should be aware that this tactic is often resorted to when the defence counsel's legal suit is a poor one. Diverting attention from the accused to the Probation Officer may be the only possible means the lawyer has of winning the case. Officers subjected to this kind of attack should recognize it as a tactic so that they are not drawn into it. In all cases officers should maintain their composure on the stand and no matter how prejudiced the question, answers should attempt to draw attention back to the accused and his behaviour. As long as Probation Officers have considered all the factors of the case - wilfulness, proof, and most importantly, are able to be explicit in their reasoning as to why court action was indicated, then the strategy of discrediting the Probation Officer will not work.

5. Hearsay

A witness may testify only to that which he knows of his own knowledge and experience. Only facts relating to proving the violations should be introduced at the level of the trial.

Since an agency person is the only one who can provide direct evidence that a probationer failed to report for his assignment, this person is the only one who can introduce this evidence in court and the P.O. should make arrangements for this witness to come to court for the trial. In some areas, arrangements may have been made to accept sworn affidavits from the agency involved. Although some courts may accept affidavits, it may not be sufficient, particularly since it denies the defence an opportunity to cross-examine the evidence contained in the affidavit. In any contested case where the defence is not willing to admit to facts there stated, an affidavit will not provide any evidence at all on the point.

(See Section III - Evidence)

6. **Use of Notes**

Referring to notes and the file is acceptable in order to "refresh your memory". Permission should be asked of the court to use notes for this purpose. If notes are required, it is a good idea to only bring those notes which contain information pertinent to the breach, i.e. records of the first meeting with the client, telephone calls for appointments, records of conversations in which you discussed reporting for work, etc. with appropriate dates, copies of registered letters, etc. Remember that a defence counsel is permitted to examine your notes to compare them with your testimony.

When using notes or file material, you should check with the area manager regarding established practice in the courts. Some courts will allow xerox copies, while other courts require the originals.

If originals are taken, make sure that photocopies are left at the office. Notes or other written material may be entered as "exhibits" by the court, and are kept by the court until appeal time has elapsed, therefore your notes and material may be lost to you for a period of time.

7. **Opinions re: Sentencing**

Offering opinions on sentence is a thorny issue which has been the subject of discussion in probation/parole for some time. Some judges are quite opposed to probation officers offering recommendations as to sentence, while others have actively solicited such opinions. Whatever the case, we should realize that sentencing is the sole responsibility of the judge, and although we may have certain opinions on what form a sentence may take, based on our perspective of a particular accused's character and his response to our particular program, the judge is required to take a number of other important variables into consideration when it comes to sentencing. Seriousness of the offence, mitigating circumstances, deterrence, and so on, form a number of areas of analysis that judges must take into consideration. As a result, one should be most careful not to usurp the sentencing function of the court.

In probation and parole, there are specific guidelines that recommendations on sentencing can be limited only to whether or not the accused will be a suitable candidate for probation. There are instances when the court may inquire from the probation officer, an opinion regarding an appropriate disposition. It is a good idea to anticipate this and to consider what the best response would be to a question inquiring whether, "given another chance", the probationer might respond positively to a further probation, or whether he would "benefit from a period of incarceration". In formulating your thoughts on the question, it might be helpful to consider the following:

(a) It is often easy to take the side of the accused and give him the benefit of the doubt, especially now that we are all in court and his neck is actually on the line.

(b) Be wary of expressing a positive prognosis, if all you have to go on is a "I-promise-not-to-get-into-trouble-again" type of statement made by the probationer just before court. Keep in mind that you have probably given the probationer a number of chances and "benefits of doubt", and that it is his failure to respond to these that has necessitated a return to court.

(c) Try not to let uncertainty cloud your opinion. In formulating your opinion, consider whether:

i) You have had enough time to gauge his past or future response to probation.

ii) You feel that the probationer's overall level of stability and functioning will augur well for a positive response.

d) You feel that his overall attitude towards the program, and sense of responsibility towards complying with his conditions, is positive enough to endure (and carry him through "looking-good-for-court" stage).

(e) Other suggestions: _____

_____

_____

Remember, you are not a professional witness, i.e. doctor or psychiatrist, so do not attempt to answer questions or offer opinions which lie beyond your area of expertise. Medical or psychiatric terminology should be avoided, and response to supervision or a discussion of the probationer's problems should be explained in terms of behavior and attitude.

You are not there to save this offender from the cruel and harsh torments of court or from a possible period of incarceration. One of the real consequences of crime is the possibility of incarceration. A wilful failure is an offence, under summary conviction, with incarceration being a real possibility.

Although you may be asked to share your own opinion regarding sentence, remember your primary role is, not to put Mr. X. in jail or keep him out of jail, but merely to give evidence regarding the "facts" relating to the offence. However, since the court may regard you as the correctional expert at the level of the community, you should nonetheless be prepared to address the issue of sentence.

Sample Opinions Regarding Sentencing Recommendations

In order to assist the new officer in providing a recommendation which does not appear to infringe on the judge's sentencing role, a number of discrete samples of sentencing recommendations are provided for perusal. Of course these are not the only ones, and are provided simply as a guide.

Question/Issue

A recommendation is sought as to the suitability of jail as a proper disposition. It may be in the form of a question from the Crown, or, in fact, a question from the defence (i.e. "Do you think that Mr. X. will really benefit if he goes to jail??).

Sample Responses

"I'm not sure that a jail term will be beneficial, although it would appear that, in view of his totally negative response in fulfilling his C.S.O. obligations, a further period of probation would not serve any useful purpose".

"I am not qualified to assess whether jail will be beneficial or not but, in view of his irresponsible response to community supervision, it does not appear that probation has been of any benefit, and that it perhaps does not serve as a sufficient deterrent in this case".

"In view of his present stability in the community, I would recommend that whatever decision is arrived at, perhaps a consideration can be given to a disposition which would permit Mr. X. to continue with his schooling or employment, (an indirect 'pitch' not to send him to jail, or if jail is likely, a pitch for intermittent sentence or T.A.P. recommendation).

Question

How do you feel Mr. X. will respond to a further period of probation?

Negative Reply:	"Unless Mr. X. undergoes a dramatic change of attitude, and begins to take his probation seriously, I am not sure that a further probation will be anything other than a meaningless exercise".
Unsure:	"Mr. X. has indicated that he is now willing to co-operate with his probation. However I feel that more time would be required to assess whether his stated motivation will endure".
Positive Reply:	"Although Mr. X's response thus far has been poor, I feel that being charged and brought back to Court has had a sobering impact on him, and at this point feel that there is a good likelihood that he will behave more responsibly from now on".

(E) CROSS EXAMINATION RESPONSE TECHNIQUES

THE PROBATION OFFICER IN THE WITNESS BOX

In most cases, the Probation Officer who prepares a report for the Court is not called as a witness and his/her report is filed with the Court without the Probation Officer being called to the box. However, if counsel for the subject of the report disagrees with the recommendation or the manner in which the report was prepared, counsel may apply to cross-examine the maker of the report. Section 14(6) of The Young Offenders Act reads:

> "Where a predisposition report made in respect of a young person is submitted to a Youth Court, the young person, his counsel or the adult assisting him, pursuant to Subsection 11(7) and the prosecutor shall, subject to Subsection (7), on application to the Youth Court, be given the opportunity to cross-examine the person who made the report."

The Probation Officer can assume that the counsel making the application to cross-examine him/her will be attempting to discredit, refute and attack the Probation Officer's opinions in the report.

Before stepping into the witness box, the Probation Officer should know the contents of the report prepared and ensure that all documentation required for the preparation of the report is available. Not only should the Probation Officer now the contents of the report, but he/she should refresh his/her memory from any original notes made of consultations with the Probationers, etc., before giving evidence.

The presiding Judge will not only be listening to the answers given, but will also be observing the demeanour and attitude of the witness on the box. Therefore, the Probation Officer should recognize the following negative qualities which might require modification:

a) overactivity in physical movement or speech;

b) speaking much too quickly, rendering comprehension difficult;

c) distracting body movements;

d) extreme tension and "uptightness";

e) overly specific and detailed answers which are confusing and boring;

f) repeated interruptions and unresponsiveness to the questions, creating a defensive appearance;

g) mumbling;

h) ramrod posture;

i) distracting facial expressions, such as grimacing, clenched jaw, eyes closing;

j) lack of eye contact, which may be perceived as evading the truth;

k) professional jargon or extremely literary terms;

l) body positions suggesting defensiveness or anger, such as putting one's hands behind one's head, or placing an arm around the back of a chair;

m) extreme shyness, suggesting uncertainty.

It goes without saying that the witness should dress in an appropriate manner as this adds to the witness's appearance in Court.

In order to testify effectively, the witness should be aware of the resistance he or she is likely to encounter form the cross-examiner. The opposing counsel can be expected to challenge the Probation Officer's views aggressively. Lawyers engage in a variety of strategic approaches, based on individual style, all with the goal of creating doubt and rejection of the Probation Officer's views and opinions contained in the report.

It is important for the witness to concentrate on accuracy and content. Any discrepancy uncovered in testimony may cause the witness to redouble efforts to explain apparent inconsistencies, back-track, and correct misimpressions. This leaves the witness flustered, defensive and intimidated, which is often the opposing counsel's goal. To discredit a Probation Officer's testimony, some defence counsel will cross-examine in a manner which demonstrates that the Probation Officer is biased against the client or that there is a personality conflict between the Probation Officer and the client. Questions will attempt to convey that the reporting sessions were characterized by a hostility towards the Probationer. If while in the witness box, the Probation Officer becomes angry or defensive as a result of these questions, this may reinforce counsel's attempt to show that the Officer does not have the objective capacity to supervise the offender.

I would now like to turn to some of the essentials in giving evidence:

1. Ready your material to refresh your memory of the case, and review your facts. The witness should answer thoughtfully and carefully and a knowledge of the facts and material will avoid inconsistencies in testimony.

2. Know your pre-sentence or pre-disposition report well and also be prepared to advise the Court as to the length of time spent in interviewing the subject or collaterals.

3. Speak clearly and slowly, using language that can be easily understood. If a technical word must be used, be certain that you explain it fully.

4. Listen carefully to questions and make sure that you understand them before answering. If you are not 100% sure of what the question means, ask for clarification. Some counsel will ask confusing questions in an attempt to perhaps rattle the witness. However, confusion can be used by the witness as well to throw responsibility back at the cross-examiner. For example, responding humbly with "I'm confused with your question. Could you ask it more plainly?" forces the counsel to work harder to make him/herself clear. A humble attitude by a witness can expose the counsel's manipulation and allow the witness to quite effectively influence the course testimony.

5. Testify only to facts within your knowledge.

6. Answer only what is asked of you and do not offer information which is not asked, even if you think it is important.

7. Keep eye contact with either the questioner or the Judge.

8. Calmly proceed to answer the questions in a loud, clear voice. If you get excited or rush through your evidence in an inaudible voice, you will probably fail to communicate the knowledge you have.

9. Be fair in your testimony. Do not make unreasonable observations that you may not be able to substantiate under cross-examination. If you do make unreasonable observations, it will result in a loss of credibility and will colour the rest of your testimony in the eyes of the Judge. Similarly, do not hesitate to acknowledge the validity of facts favourable to the opposite party when asked.

10. It is important to acknowledge an error in your testimony as soon as you become aware of it. It is too late to acknowledge the error you made once you have been cornered by inconsistent statements. By making this type of admission before being cornered, you will be acknowledging the fact that you are fallible and, more often than not, you will impress the Judge as a reasonable person.

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These points should be noted in giving evidence:

1. Do not anticipate questions. In other words, wait until the whole question has been asked before answering.

2. Do not allow counsel who is cross-examining you to cut short your answers. He may be receiving an answer from you that he does not like and, it prevent you from going on, may try to interrupt with another question or comment. If that happens, respond in a firm but courteous way by stating, "Please allow me to complete my answer to your question." However, if counsel is interrupting your answer the Judge may caution the counsel to let you finish answering.

3. Do not give opinions unless you are able to support them.

4. Do not answer a question by asking a question. For example, if you are asked, "Witness, why did you do that?", do not reply by stating, "Well, what would you have done in the same situation?". The Judge will probably admonish you by telling you that you are there to answer questions, not ask questions.

5. Do not be sarcastic in your answers, as it is not only what you are saying, but how you are saying it that the Judge is considering. In other words, the demeanour of the witness is important. In the same vein, under no circumstances should you try to give "cute" answers in response to what you think is a "cute" or improper question. By asking these type of questions, counsel may be trying to detract from the substance of your testimony, which is often a last resort of counsel when they have been unable to shake a witness's testimony. By giving that type of an answer, you are playing into the hands of the examiner and your professional credibility may be damaged.

6. Do not hurry your answers. A hurried answer on many occasions may be an incorrect answer. You are better off to take a moment to reflect on your answer before blurting it out.

7. Do not get into a shouting match with the opposing counsel, even if he is raising his voice.

8. Do not hurry your evidence. It is assumed that the Judge will want to take notes of your evidence.

9. Do not guess at answers. If you do not know the answer to a question, advise the Court of that. If you do not recall, it is better to say so than guess at an answer which is later proven to be totally inaccurate.

10. Do not become angry in the box because the defence counsel tries to show that you were biased or perhaps hostile towards the subject of the pre-disposition report or pre-sentence report. An excitable or easily angered witness is a prime target of an opposing counsel. Questions designed to make the witness angry are tactics used to frustrate and confuse the witness. A technique for responding to an insinuation or an attack on one's credibility would be to make the opposing lawyer rephrase the question. One effective approach might be for the witness to profess not to understand exactly what the lawyer is asking when he is attacking the person's credibility. It is important that the witness not show anger in response to the insinuation, but instead, concentrate on feeling successful at foiling the adversary's verbal trap.

11. Do not offer opinions or use language beyond your area of expertise: (i.e. avoid medical or psychiatric terminology.)

12. Do not argue with opposing counsel; just disagree if you do not agree with propositions that the lawyer may place before you.

13. Be careful in the use of humour. Humour, used with proper timing and delivery, can break the tension at a stressful moment or blunt the impact of a forceful attack but, attempted in the wrong way or at the wrong time, a witty rejoinder can leave the witness looking arrogant and frivolous. In general, humour that is gentle, subtle and good-natured is more likely to succeed than sharp sarcasm or flippancy.

When objections are raised by either lawyer as to the type of questions being asked, remain quiet and dispassionate while the merits are being argued. It is often helpful for you to listen to the arguments, as they may give you an indication of what is expected of you.

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In conclusion, the Probation Officer should recognize that when an application is made by opposing counsel to cross-examine him/her, that counsel will be attacking the Probation Officer's report and perhaps the Probation officer's credibility and basis for his/her opinions contained in the report. It is obvious that if counsel for

the Probationer agreed with the report, he/she would not be making the application to cross-examine the maker of the report. I hope my comments, which are not meant to be exhaustive, will better prepare the Probation Officer who may be called upon to give evidence in Court.

HYMIE WEINSTEIN, Q.C.
Barrister and Solicitor

REFERENCE SOURCES

1. Trial Magazine, January, 1984 Edition.

2. Preparing a Witness for Courtroom Testimony, by Diane R. Follingstad.

3. Preparing for Court and the Giving of Testimony, Author Unknown.

4. On the Witness Stand; The Family Therapists and Expert Testimony, in Israela Meyerstein and James C. Todd.

SECTION XIII

PROBATION CASE LAW

(A) PROBATION AS A LEGAL DISPOSITION

R. v. Tippett
R. v. Johnson
R. v. Aqozzino
R. v. Nutter, Collishaw, Dulong
R. v. Amaralik
R. v. Smith
R. v. St. James
R. v. Weber

(B) PROBATION CONDITIONS

R. v. Ziatas
R. v. Lavender
R. v. Doiron
R. v. Chisholm
R. v. Dashner

(C) DELEGATED AUTHORITY IN PROBATION

R. v. Sterner
R. v. McNamara
R. v. Shorten and Shorten

(D) ENFORCEMENT (s. 666)

R. v. Piche
R. v. Breen
R. v. Bara
R. v. Butkans
R. v. Brown
R. v. McKenzie

(E) WILFUL FAILURE OR SUBSEQUENT OFFENCES

R. v. Borland
R. v. Pinkerton
R. v. Linklater
R. v. Ladouceur

(F) REVOCATION

R. v. Casey
R. v. Tuckey
R. v. Graham
R. v. Paquette
R. v. Oakes

(G) OTHER MATTERS

R. v. Johnston
R. v. Rombis

PROBATION CASE LAW

This section contains a selection of cases which interpret the law of probation. While the list of cases does not represent the totality of case law in probation, certain key cases have been selected in order to familiarize the new officer with the more relevant decisions and interpretations. The new officer should note that in some cases, such as Paquette and Oakes, the various courts have made judgements which do not necessarily agree which each other. In the absence of a final judgement from the Supreme Court of Canada, the precedents for Ontario practice are set by the Ontario Court of Appeal. In the cases of Paquette and Oakes for example, the judgement of the Ontario Court of Appeal's consideration of Oakes provides us with the precedent for the practice of law in Ontario.

A. PROBATION AS A LEGAL DISPOSITION (s. 662 - s. 663)

1. R. v. TIPPETT

Ex parte Morris (1955), 112 C.C.C. 47 (N.B.C.A.)

The accused was convicted of operating a motor vehicle without a licence contrary to the New Brunswick Motor Vehicle Act - a summary conviction offence for which the minimum punishment was a $10 fine. The Police magistrate fined the accused $10 but "suspended" it for one year.

The court held that the magistrate could not suspend the operation of a sentence after passing same. The power to suspend sentence does not mean suspending the execution of a sentence after imposing the same but suspending the imposing of sentence. Once sentence has been passed, a court or person exercising judicial functions cannot suspend its execution except as directly authorized by statute, and such authorization was not provided in this case.

2. R. v. JOHNSON

(1972), 17 C.R.N.S. 254 (B.C.C.A.)

The accused was convicted of trafficking in a narcotic and was fined $500. He was also directed to comply with a probation order for 12 months. The Crown appealed, contending that the sentence was illegal because, under s. 646 (2) of the Code, a fine cannot be imposed when only a probation order is added. Because the offence was indictable and punishable by imprisonment for more than 5 years under s. 646 (2), the fine could only be imposed in addition to "any other punishment that is authorized."

The court found that s. 645 of the Code made it abundantly clear that different degrees or kinds of punishment are contemplated under the general title of "Punishment Generally" and that punishment is not confined to fines and imprisonment. When a sentence is suspended and a person is ordered to be released on conditions, that would not be deemed "punishment" because, the court stated, it is actually a suspension of punishment. But when an accused is convicted and ordered or directed to obey and comply with certain conditions in a probation order made under s. 663 (1) (b), that would be a form of punishment. Therefore, a fine could legally be imposed under s. 646 (2)

in addition to a probation order, as the latter does constitute a "punishment" under the section.

3. R. v. AGOZZINO

(1970) 1 C.C.C. 380 (Ont. C.A.)

In the course of its reasons, the court had occasion to comment that the imposition of a fine following the suspension of sentence under s. 663 (1) (a) would be an illegal sentence. Presumably, the basis for this position is that a suspended sentence under that section was intended to cover those situations where the judge chose to withhold or suspend the imposition of <u>any</u> penalty.

4. R. v. NUTTER, COLLISHAW AND DULONG

(1972) 7 C.C.C. (2d) 224 (B.C.C.A.)

The court interpreted s.663 (1) (b) to mean that where the judge had imposed a sentence of over two years imprisonment, he has no jurisdiction to impose a term of probation also.

5. R. v. AMARALIK

(1984) 16 C.C.C. (3d) 22 (N.W.T. C.A.)

Pursuant to s. 663(1) (b) of the Criminal Code, the court may impose a period of probation in addition to a sentence of imprisonment where the imprisonment is "for a term not exceeding two years". Where the accused is convicted of more than one offence and sentenced to consecutive sentences of imprisonment, in calculating whether or not the sentence of imprisonment exceeds two years, the court is required to consider the aggregate of the periods of imprisonment in view of s. 14 of the Parole Act. The Parole Act provides that where a person is sentenced to two or more terms of imprisonment the terms of imprisonment to which he has been sentenced shall, for all purposes of the Criminal Code, be deemed to constitute one sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment commences and ending on the expiration of the last to expire of such terms of imprisonment. Accordingly, the court may only impose a probation order where the total sentence imposed for all offences does not exceed two years.

6. R. v. SMITH

(1972) 7 C.C.C.(2d) 468 (N.W.T.T.C.)

In this case, the court found that where <u>both</u> a term of imprisonment and fine are imposed, s. 663 (1) (b) should be interpreted to mean that the Judge could not also impose a probation order. The section was only intended to apply where a probation order would be directed in addition to <u>either</u> a fine or a term of imprisonment but not where <u>both</u> have been imposed.

7. R. v. ST. JAMES

(1981) 20 C.R. (3d) (Que. C.A.)

The accused pleaded guilty to a charge under s.389(1) of the Criminal Code (arson). The trial judge suspended the sentence with respect to imprisonment and imposed a fine of $500.00 and a three year probation order. On appeal, the court held that s.663(1) (a) and (b) gives the court jurisdiction to either suspend sentence and impose probation or impose fine or imprisonment and a probation. The court could not order the suspension of sentence and at the same time impose a fine. Also, the court could not impose imprisonment, a fine and a probation order at the same time.

8. R. v. WEBER

(1980), 52 C.C.C. (2d) 468 (O.C.A.)

The accused appealed from a sentence of 30 days imprisonment to be served intermittently on weekends and 18 months probation. Although the trial judge ordered that the accused be on probation while not serving the intermittent sentence, the formal probation order (Form 44) simply provided that he be on probation for 18 months "from the date of this order or, where para. (d) above is applicable, the date of expiration of his sentence of imprisonment". On appeal, the accused argued that the Court had no power to impose a term of probation extending beyond the time taken to serve the intermittent sentence.

The Court of Appeal dismissed the appeal. The Court held that para. (b) and (c) of s.663(1) provide that the judge may, in addition to imposing a sentence of imprisonment, place the accused on probation or where the sentence is to be served intermittently, direct that the accused shall comply with a probation order when he is not in confinement. However, the Court still has the power to impose a term of probation under s.663(1) (b) in addition to the mandatory term of probation required by s.663(1) (c) where an intermittent sentence is imposed. Hence, s.663(1) (b) should not be construed so as to make in an exclusive alternative to s.663(1) (c), such that the use of probation after the expiration of sentence is reserved only for cases of uninterrupted term of imprisonment. The probation order in this case must be amended to provide that its terms should be binding at all times when the accused is not in confinement and thereby covering the two probation periods.

B. CONDITIONS OF PROBATION

1. R. v. ZIATAS

(1974) 13 C.C.C. (2d) 287 (Ont. C.A.)

The accused was convicted of assault with intent to resist arrest and was fined $150 and placed on probation for one year. One of the conditions of the probation order was that he should not operate a motor vehicle for one year. On appeal, the court decided that the judge

proceeded upon a wrong principle in imposing this additional punishment. His only power, if he had any jurisdiction under s. 663 (2) to impose the condition, was to impose such reasonable conditions as he considered desirable for securing the good conduct of the accused and for preventing the repetition by him of the same offence or the commission of other offences. Therefore, the appeal was allowed and the condition in question was struck out of the probation order.

2. R. v. LAVENDER

(1981) 59 C.C.C. (2d) 551 (B.C.C.A.)

Regina v. Ziatas was followed by the B.C.C.A. in this case. Lavender was convicted on a charge of receiving stolen property and was adjudged a fine of $1,000.00 and a 6 month period of probation which included a condition ordering a 60 day driver's licence suspension. The B.C.C.A. held that the driving licence suspension was inappropriate in the circumstances. This decision affirmed the exposition of the law stated by Mr. Justice Martin of the Ontario Court of Appeal in Ziatas; if a judge has jurisdiction to impose a probation condition under s.663 (2), he only has the power to impose "such reasonable conditions as considered desirable for securing the good conduct of the accused and preventing the repetition by him of the same offence or the commission of other offences".

3. R. v. DOIRON

(1973) 9 C.C.C. (2d) 137 (B.C.S.C.)

The accused was charged under s. 666 (1) of the Code with wilfully failing to comply with a condition of his probation order, specifically that condition requiring "that he must ask permission of John Shea if he wishes for any reason to leave the town where he resides". The probation order also had other conditions requiring that he notify Shea of any change of address or occupation, that he work under the supervision of Shea and that he "reside within the jurisdiction of the court with the exception of employment out of town".

The court held that it was necessary to read the condition of probation order together in order to determine the true purpose and intent of the order. In so doing, the court concluded that the said conditions were so vague, uncertain and contradictory as to be incapable of rational interpretation or enforcement and were therefore void. This was a complete defence to the charge, as neither the accused nor his advisers could reasonably be expected to know precisely what conduct or acts were prohibited by the probation order.

4. R. v. CHISHOLM

(1985) N.S. C.A.

This was an application by the Crown for leave to appeal against a sentence granted, on the grounds that it inadequately reflected the element of deterrence and was inadequate having regard to the nature of the offences committed and the circumstances of the accused. The

court had granted a suspended sentence and directed that the accused be released upon conditions prescribed in a probation order to last three years. The conditions included: (i) accused abstain from the consumption of alcoholic beverages and non-prescription drugs; (ii) accused seek any drug or alcohol counselling as directed by the probation service; (iii) accused report to the court on September 5, 1985; (iv) accused present himself for enrolment at Elan One Corp., Poland Spring, Maine, U.S.A.

Fifteen offences committed by the accused and co-accused took place at five separate times in 1984. The co-accused were about the same age as the accused, and had no serious criminal records, but were sentenced to short terms of imprisonment. On sentencing of the accused, the defence called a consulting psychiatrist who concluded that the accused had a serious conduct or personality disorder and a serious drug problem, and that treatment in a recognized therapeutic community would be desirable. The Court of Appeal upheld the validity of the sentence, including the condition requiring enrolment in a program in the U.S.A.

5. R. v. DASHNER

(1974) 15 C.C.C. (2d) 139 (B.C.C.A.)

On a conviction for assault causing bodily harm, the accused was fined and put on probation for one year. A condition of the probation order was that the accused pay his victim the sum of $500 as restitution or reparation. On appeal it was held that great care should be taken to ensure that restitution or reparation is not made a condition of the probation order unless the Court is satisfied that the convicted person is able to pay and that the amount ordered represents "actual loss or damage sustained". The general purpose of probation orders is to secure the good conduct of the convicted person as opposed to compensating victims of crime, as such victims have other remedies under the Criminal Injuries Compensation Act or ordinary civil suit. As there were no facts before the sentencing Judge to show the amount of the actual loss, the condition of restitution was set aside by the Court of Appeal.

C. DELEGATED AUTHORITY IN PROBATION (s.663)

1. R. v. STERNER

(1982) 64 C.C.C. (2d) 160n. 40 N.R. 423 (S.C.C.)

In this case the S.C.C. dismissed an appeal from the Saskatchewan Court of Appeal which had held that while it was desirable for a judge to inform the accused person personally of the effect of the breach of probation, it was not necessary in all cases that he should do so. The brief decision from the S.C.C. stated:

> "We regard s.663(4) (a) (b) and (c) as administrative provisions which are delegable, once the probation order is made by the presiding judge. In this

particular case, the accused was advised of the consequences of a breach of the probation order by the Deputy Clerk and indeed, on the facts, knew of the consequences. It was not necessary that he be made aware by the judge personally."

2. R. v. McNAMARA

(1982) 66 C.C.C. (2d) 24, 36 O.R. (2d) 308 (C.A.)

In this case, heard in the Ontario Court of Appeal, the appellant was charged with wilful failure to comply with the probation order adjudged after conviction for certain criminal offences. Counsel for the appellant moved for dismissal on the ground that the appellant was not bound by the probation order because the court had failed to inform the appellant of the consequences of non-compliance as required by s.663(4)(c).

It was conceded that the Crown had complied with subsections 663(4)(a) and (b) which require that the court cause the order to be read and a copy given to the appellant. It was contended that s.663(4)(c) required the presiding judge to inform the accused personally of the consequences of failure to comply and that affirmative evidence must be given that the requirement was satisfied.

The court of appeal reviewed the leading cases on this point (including R. v. Piche; R. v. Palmero; R. v. Shaver; R. v. Lequillox; R. v. Scott; R. v. Haran; R. v. Dobson; R. v. Leboeuf; R. v. Steiner) and held that it has been established that it is not necessary for the presiding judge to personally inform the offender of the consequences of a breach of probation. It was added that it is impractical to call court officials to prove compliance by viva voce evidence. The admission provided by the signed acknowledgment of the offender on the probation order is direct evidence which satisfies the requirement of the statute unless it is contradicted by other evidence.

The court added that the manner in which the duty of compliance with s.663(4)(c) may be delegated will vary with the circumstances in different courts. Where the probationer is not in custody, it is appropriate to delegate the duty of compliance to the probation officer.

3. R. v. SHORTEN and SHORTEN

(1975) 29C.C.C. (2d) 528, (1976) 3 W.W.R. 187 (B.C.C.A.)

The application of s.663 (2) (c) of the Criminal Code, which provides that a judge may attach as a condition to a probation order that the accused make restitution, involves the exercise of a judicial function which the trial judge has no jurisdiction to delegate to another person such as a probation officer. In making an order of restitution, the trial judge must fully dispose of the matter and not leave the performance of part of his function to the discretion of others. Accordingly, a term of a probation order which provides that the accused are to make restitution of a certain amount to be paid "in such amounts and at such times as the probation officer shall order, at his complete discretion" is

invalid because the judge has delegated to the probation officers the duty to form a judicial opinion of the accused's ability from time to time to pay and because the judge has delegated his power to make such orders.

D. ENFORCEMENT (ss. 664 and 666)

1. R. v. PICHE

(1976) 31 C.C.C. (2d) 150, 5 W.W.R. 459 (Sask. Q.B.)

On the charge of wilfully failing to comply with a probation order contrary to s. 666 (1) of the Code, the Crown must prove that, pursuant to s. 663 (4) (b) of the Code, the accused, at the time the probation order was made, was given a copy of the order, since the offence reads "an accused who is bound by a probation order...". The provisions of s. 663 (4) were designed for the protection of the accused that he might know the conditions of the order. Unless these provisions were complied with, the accused was not "bound" by the order. Therefore, in the absence of proof that they were complied with, the offence of failing to comply with the order has not been established.

2. R. v. BREEN

(1983), Prov. Ct. Crim. Div.

The accused was charged under s. 666(1) of the Criminal Code for failing to comply with his probation order. A copy of the probation order said to have been breached by the accused was filed as an exhibit. The order had been signed by a judge but the acknowledgement portion of the order, acknowledging that the order was read over to the accused, was understood by him and that the accused was informed of the provisions of s. 664(4) and s. 666, had not been signed by the accused.

The court held that a signed acknowledgement is only one way by which the Crown may prove compliance with s. 663(4). The other way is for the Crown to adduce viva voce evidence to establish that: (i) the order has been read to the accused, (ii) a copy of the order has been given to the accused, and (iii) the accused has been informed of the provisions of s. 664(4) and s. 666.

3. R. v. BARA

(1981) 58 C.C.C. (2d) 243 (B.C.C.A.)

Following her conviction of a Criminal Code driving offence, the accused was fined and placed on probation. The trial judge informed the accused of the provisions of s.666 but not s.664(4). Bara was subsequently convicted on a charge of breach of probaton which she appealed on the basis that she had not been informed of the provisions of s.664(4). The Court of Appeal held that Bara was not bound by the

probation order. It is an essential ingredient that the accused be advised of the provisions of s.666 and s.664(4). Informing the accused of one or the other does not make her partially bound. Therefore, failure to inform Bara of s.664(4) made the probation order unenforceable.

4. R. v. BUTKANS

(1972) 4 W.W.R. 262 (Man. Co. Ct.)

The accused was charged with wilfully having failed to comply with the terms of a probation order, specifically in having failed to pay a sum of money by June 18th, 1970, as restitution for loss suffered by others as a result of the offence for which he was convicted. No money had been paid as of June 18th, 1970, but the charge was not laid until January 13th, 1971.

The court held that the failure to make restitution was not a "continuing offence" and, as the six-month limitation period provided in s. 721(2) of the Code was applicable here, the Crown's right to prosecute the offence was barred after the expiration of six months from June 18th (the 18th being the date on which the subject matter of the proceedings arose). Furthermore, the onus was on the Crown to prove "wilful" failure to make restitution. In this case, the Crown had simply proved that the accused failed to pay the restitution, but no evidence was introduced to prove that the accused was employed, had assets of any kind, or was otherwise financially able to comply with the restitution requirement. Had such evidence been available, it would have been open for the court to infer that the accused's failure to pay was "wilful" and by his own choice, rather than through inability by virtue of insolvency, or some other means. As the Crown failed to discharge this onus of proving "wilful" failure, the charge was dismissed.

5. R. v. BROWN

(1984) Nfld. S.C.

The accused was charged with unlawfully and wilfully failing to comply with his probation order, by failing to make compensation in the amount of $431.50 to the Provincial Court. The charge was acquitted by the trial judge and an appeal by way of stated case was submitted by him to determine whether the time limitation expressed in s. 666(1) of the Criminal Code, for prosecution of a person who has violated the provisions of a probation order, runs from the date upon which the period of probation ended or from the date upon which the accused failed to comply with it.

In the context of the facts of the case, the issue was whether the failure to pay compensation under the probation order on or before May 1, 1982 was an offence then complete, or was a continuing offence until the probation period ended on February 5, 1983. Pursuant to s. 721, the time limitation for prosecution is six months after the time when "the subject matter of the proceedings" arose.

It was held that the six month limitation period for laying a wilful failure charge runs from the date when the failure to comply occurred. When a person is required by the terms of a probation order to make restitution by a certain date and does not do so, the offence is complete on that date and time starts to run on the six month limitation period, notwithstanding that the probation period continues thereafter.

6. R. v. McKENZIE

(Unreported decision of the Saskatchewan Court of Queen's Bench, 26 April, 1982)

This decision involves an appeal by the Crown from the dismissal of a charge laid under section 666(1) of the Criminal Code. The two main issues on appeal were: (1) the sufficiency of the information, and (2) the need for evidence of mens rea.

The substance of the breach of probation charge was the probationer's failure to pay restitution as ordered. The information did not contain the word 'wilfully' in reference to the failure to comply. Counsel for the probationer submitted that he had not been mislead by the omission and consequently did not raise any objection at trial or on appeal. The Court of Queen's Bench relied on the Supreme Court of Canada's decision in R. v. Cote which provided that where an information recites all the facts and relates them to a definite offence identified by the relevant statutory provision, the information is not defective. Therefore, as long as the accused is reasonably informed of the charge and has an opportunity to present his full answer and defence, the information will stand. Consequently, the trial judge erred in declaring the information a nullity based on the omission of the word 'wilfully'.

On the second ground of appeal, the Court held that the burden of proof is on the Crown to show that the breach of probation was deliverate and intentional and not accidental or inadvertent. This onus may be satisfied by raising an inference of some evidence upon which a properly instructed jury could reasonably base a finding of guilt. The Court of Queen's Bench held that there was some evidence of mens rea based on inferences from the fact that the accused was ordered by the Court to make restitution, that he was advised of the potential consequences of non-compliance and that he had obtained two extensions of the time to pay.

In the result, the appeal was allowed on both grounds, the trial decision was set aside and the case remitted for trial.

E. WILFUL FAILURE ON SUBSEQUENT OFFENCES

1. R. v. BORLAND

(1970) 2 C.C.C. 172 (N.W.T.T.C.)

Following a conviction for common assault, the accused received a suspended sentence and entered into a "recognizance", one condition of which required that he keep the peace and be of good behavior for a

period of six months. During that time, he was convicted of two provincial offences, careless driving and consuming liquor while a minor. The question then arose as to whether a conviction of a provincial offence could constitute a "failure to observe the conditions of the recognizance" (as provided by the Code provisions in force at that time). The court held that a conviction for such an offence may form the basis for such an allegation.

2. R. v. PINKERTON

(1978) 3F C.C.C. (2d) 538 (B.C. Co. Ct.), appealed (1979) 46 C.C.C. (3d) 284 (B.C.C.A.)

Pinkerton was convicted on a charge of mischief in May of 1976, and was given a term of imprisonment to be followed by a period of probation. While on probation he was convicted of assault. Subsequently, he was charged with the offence under s. 666 (1) of the Criminal Code. The issue, then, was whether there could be convictions for both the assault and the breach of probation offences. The appeal court held that a subsequent conviction on a s. 666 charge is proper under the circumstances. The court relied in part on an unreported decision in R. v. Sewap (1975) (Sask. Q.B.) which held that parliament clearly envisioned multiple convictions with respect to s. 666 (1)and to hold otherwise would render s. 666 (1) useless where the breach of probation occurred as a result of the commission of another offence. The Court of Appeal upheld this decision.

3. R. v. LINKLATER

(1983) 9 C.C.C. (3d) 217 (Yukon Terr. C.A.)

Section 664 (4) of the Criminal Code provides that where an accused who has been given a suspended sentence and placed on probation subsequently commits another offence, the probation order may be revoked and sentence imposed.

Section 11 (h) of the Charter provides that any person charged with an offence has the right "if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again".

The issue in this case was whether s. 664(4) would violate s. 11(h) of the Canadian Charter of Rights and Freedoms where the probation order merely contained provisions concerning keeping the peace, attending at court when required, reporting to a probation officer, abstaining from the consumption of alcohol and notifying the court or probation officer of change of address or employment. It was held that an accused who is given a suspended sentence and placed on that kind of probation order has not been punished within the meaning of s. 11(h). Such a probation order is rehabilitative in effect and not punitive.

4. R. v. LADOUCEUR

(Unreported decision of the Summary Convictions Appeals Division of the County Court, Judicial District of York, April 10, 1981)

Accused was originally fined and placed onprobation for careless use of a firearm. While on probation, he was charged and convicted on a subsequent offence of Theft Under. When sentenced on the new offence, the judge took into account that the offence took place while the appellant was on probation and the penalty ($250 fine) was accordingly of greater severity than the punishment would otherwise have been.

The conviction on this fresh offence then became the basis of a breach of probation charge, to which the accused pleaded guilty, and was sentenced to 14 days in jail.

The issue in this appeal was that it was improper for the appellant to have had a sentence imposed for the breach, when he had already been punished for the offence which gave rise to the breach charge. (Moreover, the punishment on this second offence had been more severe because of the fact that it had occurred while the accused was on probation.)

The appellate court concluded that there are indeed two separate offences involved, and that Kienapple v. The Queen does not apply. As a result, the charge of breach of probation is justified. The Court also felt that given the fact that no jail terms were imposed for the first two offences, that the sentence of 14 days on the third offence was appropriate.

F. REVOCATION: CASE LAW

1. R. v. CASEY

(1977) 1 W.C.B. 141 (Ont. C.A.)

The appellant appealed a sentence of 18 months definite and 18 months indefinite, and three months concurrent imposed on convictions for robbery and possession of stolen property over $200, respectively.

When C was convicted initially, the trial judge suspended the passing of sentence and placed C on probation for 2 years. Subsequently, C was convicted for 3 separate offences committed while on probation, in addition to 2 convictions for wilfully failing to comply with a probation order. C was then brought back before the original trial judge, who revoked the initial probation order and imposed the sentences presently being appealed.

The Court of Appeal was of the view that while it was proper for the trial judge to consider not only the gravity of the offences for which C had been convicted initially, but also his conduct demonstrated by the five offences committed between C's conviction and final sentencing, it would have been improper to have imposed or increased the sentences

now under appeal because of the intervening convictions for which C had already been sentenced. However, consideration of his conduct was necessary for the purpose of assessing his character and amenability to rehabilitation.

2. R. v. TUCKEY

(1977) 34 C.C.C. (2d) 573 (Ont. C.A.)

Where an application is made by a prosecutor pursuant to s. 664 (4) of the Criminal Code to have an accused brought back before the judge who gave the accused a suspended sentence, the accused having committed a further offence while on probation, the basic principles of natural justice apply. Accordingly, although the Criminal Code does not require an information on oath, the minimum requirement is that the accused, before being brought before the judge, should be given reasonable notice in writing of the Crown's intention to take such proceedings. This notice should clearly articulate the nature of the proceedings, the grounds upon which the Crown intends to rely in support of its application, the nature of the order sought, and the hearing date. As well, the accused must be given a fair opportunity to make full answer and defence. Further, in imposing sentence under this subsection, the judge must consider that it may be that the accused has forfeited his right to leniency, the trial judge is then to impose a sentence proportionate to the offence which the accused had committed. It is wrong, therefore, for the judge at the time he suspends the passing of sentence to indicate that if the probation is breached he will be given any particular term, such as a penitentiary term of imprisonment.

3. R. v. GRAHAM

(1975) 27 C.C.C. (2d) 475 (Ont. C.A.)

Section 664 (4) of the Criminal Code which provides that "the Court that made a probation order" may require the accused to appear before it and may revoke that order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, only gives jurisdiction to the provincial court judge who originally suspended sentence to so act in the absence of either a transfer order obtained pursuant to s. 665 (1) of the Criminal Code or evidence that, the original Judge being unable to act, the other Judge was invoking the alternative jurisdiction given by s. 665 (2) of the Criminal Code. Accordingly, where s. 665 has not been complied with, a sentence passed upon revocation of a probation order by a judge other than the judge who originally suspended sentence must be quashed. Further, if another judge does act under ss. 664 and 665 then as a matter of practice he should have before him all the material that was before the judge who originally suspended sentence.

4. R. v. PAQUETTE

(1981) C.C.C. (2d) 413 (Quebec Court of Appeals)

The Quebec Court of Appeal considered the case where the accused's probation was revoked, and where he was as a result given a three year sentence to run consecutively to the four year sentence imposed for the subsequent offence. (The offences in question were robberies.) The accused appealed from sentence, claiming that a consecutive sentence was illegal, and also on the grounds that it was excessive. The appellate court, in its judgement, held that the revoking judge is legally entitled to impose a consecutive sentence. The Court also held that in considering the severity of the sentence which he is considering for the original offence, the judge is not bound to the circumstances which existed at the time the original order was made, but is entitled to take into account circumstances which have occurred since the original order was made.

5. R. v. OAKES

(1977) 37 C.C.C. (2d) 84 (Ont. C.A.)

In this case, the accused, while on probation, was convicted of a further offence for which a custodial sentence was imposed. He was subsequently brought back before the Judge who originally suspended the sentence, and under s.664(4) of the Criminal Code, the probation order was revoked and a sentence of nine months' imprisonment consecutive to the sentence then being served was imposed. The accused appealed the consecutive sentence arguing that the judge had no power to impose a consecutive sentence in those circumstances. The court found that a sentence of imprisonment commences when it is imposed. Since the accused was not already serving another sentence when the passing of sentence was originally suspended, there was no sentence to which the subsequent sentence could be made consecutive. Moreover, since a consecutive sentence must comply with the circumstances as described in s.645(4), and since none of these circumstances existed, the trial judge had no power to impose a consecutive sentence in this case. However, it would have been open to the judge to impose a longer term of imprisonment, to be served concurrently upon revocation of the probation.

G. OTHER MATTERS

1. R. v. JOHNSON

(1984) Prov. Ct. of B.C.

This case dealt with the status of a probation order with respect to a summary offence while under appeal to the County Court. It was decided that in a case where a person has been placed on probation by a Provincial Court judge, and a summary conviction appeal has been taken to a County Court, an appellant can apply to a judge of that court for

an order staying the operation of the probation order pending the outcome of the appeal. If no such order is made, the probation order remains in full force and effect despite the pending appeal.

2. R. v. ROMBIS

(1983) Ont. C.A.

This was an appeal from an acquittal by the County Court, of a conviction after trial on a charge that the accused wilfully failed to comply with his probation by failing to do one hundred hours of community service work by October 31, 1981. The probation order had been transferred pursuant to s. 665(1) and the County Court held that the Provincial Court in the judicial district to which the probation order was transferred had no power to certify a copy of such order for evidentiary purposes.

The appeal was allowed by the Court of Appeal. It was held that where a probation order is formally transferred from one court to another pursuant to s. 665(1), it is transferred in all respects, as if the new court had made the order. Therefore the new court has the power to certify a copy of the order.

LOCAL PRACTICES CHECKLIST

Through out the manual, are frequent suggestions referring the probation officer to his area manager in order to determine local practices on certain procedures. In order to provide the new officer with a handy reference as to "who does what", these items are brought together in the following pages.

s. 666 FAIL TO COMPLY

1. **Discretion** - Is there a requirement to consult with somebody before laying a charge under s. 666?

YES ___ NO ___

If so, who is consulted? _____

2. **Jurisdiction & Documents**

1. Does local court require jurisdiction in order to enforce order?

YES ___ NO ___

If not, who is responsible for securing copies of original documents for trial?

_____

2. Does local court require service of Canada Evidence Act notice?

YES ___ NO ___

If so, service of notice is responsibility of:

_____

3. Subpoenas prepared by: _____
(P.O., Crown, police)

4. J.P. located at: _____
(address)

5. Are unserved summonses automatically extended by court?

YES ___ NO ___

6. Are restitution ledgers, and other official records acceptable as secondary evidence?

_____

_____

If not, who gives evidence in restitution cases?

_____

_____

7. What are recommended wordings for section 666 informations:

1. _____

2. _____

3. _____

4. _____

5. Is there a multiple information form for more than two charges on an information?

_____

3. **Trial Date**

1. Does P.O. have responsibility for tracking his or her Fail to Comply cases in order to find out trial date?

YES ___ NO ___

If not, who notifies P.O.?

_____

(subpoena from police, C.L.O. etc.)

2. What is procedure for use of notes in Court?

_____

Other practices or procedures:--

4. **Revocation**

1. Does local practice require that Crown be notified of all subsequent offences?

   YES ___ No ___

   If not, what are the limitations?

   _____

2. Preparation of revocation documents the responsibility of: _____ (P.O./Crown/other)

   If P.O. prepared documents, what documents is he/she responsible for?

   _____

   _____

   _____

3. Local court practice requires P.O. to attend court for revocation hearing:

   YES __ NO __

   If so, how is P.O. notified of hearing date?

   _____

4. What is recommended wording for section 664 affidavit?

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